IN THE SUPREME COURT OF MISSOURI

No. SC83778

THE STATE OF MISSOURI,

Respondent/Cross-Appellant,

v.

PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI, and
PLANNED PARENTHOOD OF THE ST. LOUIS REGION,

Appellants/Cross-Respondents.

On Appeal from the Circuit Court of Cole County
Hon. Byron L. Kinder, Circuit Judge

BRIEF OF RESPONDENT/CROSS-APPELLANT THE STATE OF MISSOURI

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INTRODUCTION

This case raises the question of whether a private entity may seek to excuse itself from the rules for receiving public funds that all other recipients must follow. Defendants Planned Parenthood of Kansas and Mid-Missouri ("PPKM") and Planned Parenthood of the St. Louis Region ("PPSLR") (collectively, "Planned Parenthood"), two providers of family planning services, claim that they were entitled to receive state family planning funds under two appropriations (the "Appropriations") even though they openly refused to comply with the lawful conditions imposed by the General Assembly in the Appropriations on all recipients of those funds. In essence, Planned Parenthood wants to dictate the terms of Plaintiff the State of Missouri's family planning program. But it is the province of the General Assembly, not Planned Parenthood, to determine the purposes for which public funds may be spent and the rules by which organizations voluntarily seeking public funds must abide.

The General Assembly's overriding goal in the Appropriations was to provide family planning services to Missourians, but, in accordance with the long-standing public policy in Missouri, to prohibit the expenditure of any family planning funds that would "directly or indirectly subsidize abortion services or administrative expenses." To fulfill that goal, the General Assembly, consistent with its obligations under Article III, § 23 and Article IV, § 23 of the Missouri Constitution to specify the purpose of the Appropriations, included conditions in the Appropriations that applied only to the funds subject to the Appropriations. Those condition were designed "[t]o ensure that the state does not lend its imprimatur to abortion services" and "to ensure that an organization that

provides abortion services does not receive a direct or indirect economic or marketing benefit from these funds." All organizations were required to comply with those conditions to be eligible to receive state family planning funds.

The Appropriations prohibited a fund recipient from sharing a similar name with any affiliated abortion provider. Planned Parenthood undoubtedly shared a similar name with its affiliated abortion providers. Planned Parenthood of Kansas and Mid-Missouri (a family planning provider) is affiliated with the abortion provider Comprehensive Health Services of Planned Parenthood of Kansas and Mid-Missouri ("Comprehensive Health"). Planned Parenthood of the St. Louis Region (a family planning provider) is affiliated with the abortion provider Reproductive Health Services of Planned Parenthood of the St. Louis Region ("Reproductive Health"). The names of the Planned Parenthood family planning providers and their affiliated abortion providers are strikingly similar and obviously seek to capitalize on the well-recognized registered trademark "Planned Parenthood," which is associated with abortion services throughout the United States.

The Appropriations also prohibited a fund recipient from sharing facilities, expenses, employee wages and salaries, or equipment with any affiliated abortion provider. Planned Parenthood shared facilities, expenses, employee wages and salaries, and equipment with its affiliated abortion providers. Planned Parenthood and its affiliated abortion providers were the sole occupants of buildings owned by Planned Parenthood. They shared utility and numerous other expenses. The affiliated abortion providers relied on Planned Parenthood's employees to manage their operations. Reproductive Health had no officers or employees of its own and Comprehensive Health

had no management employees of its own. Planned Parenthood shared equipment with its affiliated abortion providers. Indeed, Reproductive Health used equipment and supplies, including equipment and supplies used to perform abortions, owned by its affiliated Planned Parenthood family planning provider.

Planned Parenthood would like this Court to believe that its family planning operations do not subsidize its abortion activities. Peter Brownlie, the President and CEO of PPKM, recently filed a declaration in the federal litigation concerning the Appropriations that candidly concedes the truth: Planned Parenthood's family planning operations provide a substantial subsidy to its abortion activities. A27-39. These subsidies are precisely the reasons that have compelled Planned Parenthood to insist that it must share a similar name, facilities, expenses, employee wages and salaries, and equipment with its affiliated abortion providers.

Mr. Brownlie admits that Planned Parenthood has purposely linked its name with the names of its affiliated abortion providers so that Planned Parenthood will be "associated in the minds of the public with [its affiliated abortion providers] and the work [they do] in fulfillment of [Planned Parenthood's] mission" to provide abortions. A31-32. Mr. Brownlie also admits that Planned Parenthood's family planning organizations subsidize the operations of their affiliated abortion providers. He states that Comprehensive Health's occupancy costs would increase by $850,000 plus at least $80,000 per year if it had to occupy medical office space outside of the facility it now shares with PPKM and that Comprehensive Health's personnel expenses would increase by $144,000 if it had to hire its own management employees. A32-37. This shows that

Comprehensive Health's sharing of facilities, expenses, and employee wages and salaries with PPKM has resulted in substantial cost savings to Comprehensive Health. (Reproductive Health's sharing of facilities, expenses, employee wages and salaries, and equipment with PPSLR has similarly resulted in substantial cost savings to Reproductive Health.) Mr. Brownlie states that the increased costs that Comprehensive Health will incur if it cannot share facilities, expenses, and employee wages and salaries with PPKM will "result in an increase of approximately $51, or approximately 15% of the price of a first trimester abortion." A39. Thus, any state family planning funds received by Planned Parenthood would effectively subsidize the abortion services provided by its affiliated abortion providers.

This is precisely what the Appropriations sought to prevent. But Planned Parenthood insists that it was entitled to state family planning funds without adhering to the conditions of the Appropriations.

The Appropriations also prohibited fund recipients from directly referring patients to abortion providers, distributing marketing materials about abortion services to patients, or assisting or counseling patients to have abortions. Yet, Planned Parenthood took such actions. Planned Parenthood directly referred patients to its affiliated abortion providers for abortion via the telephone, through its Internet website, and through its various health centers. It assisted and counseled patients to have abortions by distributing informed consent forms to them. It admittedly furnished and made available to patients "brochures, advertisements, pamphlets, or other information regarding abortion services …, including …services available at [its affiliated abortion providers]." LF 1133, 1152-

53; A57, A59-60. Of course, Planned Parenthood's affiliated abortion providers received an economic benefit whenever Planned Parenthood referred patients to them for abortion, assisted or counseled patients to have abortions performed by them, or distributed materials marketing their abortion services. And, in direct violation of Missouri law, Planned Parenthood sought state family planning funds that would have been used to give the State's imprimatur to abortion services.

Planned Parenthood violated almost every eligibility condition in the Appropriations. It has conceded the economic and marketing benefits that its affiliated abortion providers would receive through state family planning funds if Planned Parenthood were allowed to receive such funds. The trial court, therefore, correctly found that Planned Parenthood was not eligible to receive funds under the Appropriations under the plain language of the Appropriations and the clearly expressed intent of the General Assembly.

Instead of seriously attempting to demonstrate its compliance with the Appropriations, Planned Parenthood tries to distract the Court from the weakness of its case on the merits by leveling false personal attacks against the Special Assistant Attorney General and asserting arguments that are irrelevant to the merits of this case. Planned Parenthood falsely claims that the Special Assistant Attorney General has been "admonished" for exceeding his authority when his appointment letters from the Missouri Attorney General confirm that he has acted within the scope of his authority and has properly pursued the State's interests in this litigation.

Planned Parenthood asserts that this case is not justiciable because, it maintains, the State is asserting claims against the Director of the Missouri Department of Health. Yet, the State's Second Amended Petition contains no such claims. Indeed, the Director is no longer even a party in this case. The Attorney General's most recent appointment letter expressly approves of the claims that the State has filed against Planned Parenthood.

Planned Parenthood relies on the Director's misconstruction of the Appropriations as a defense to its non-compliance with the Appropriations. The Director, however, could not ignore the plain language of the Appropriations and deem Planned Parenthood eligible to receive state family planning funds when it clearly was not. It is the Court's duty to enforce the Appropriations' plain language and the General Assembly's intent.

Planned Parenthood invokes the federal Title X program to justify its abortion referral, marketing, assistance, and counseling activities that violate the Appropriations. But nothing in the federal Title X program required any such activities. Indeed, the United States Department of Health and Human Services and the Missouri Department of Health have recently acknowledged that the restrictions in the Appropriations are not inconsistent with the federal Title X program. A61-64.

Planned Parenthood argues that the Appropriations violated Article III, § 23 of the Missouri Constitution. But the Appropriations did not contain any general legislation and did not amend any general statute. All of the conditions in the Appropriations were designed to ensure that state family planning funds were spent properly for the General Assembly's intended purpose. In light of Planned Parenthood's repeated litigation

against the State's family planning program, the General Assembly was compelled to state the conditions of the Appropriations. Ironically, Planned Parenthood claims that the Appropriations were ambiguous while arguing that the General Assembly acted improperly by including any conditions in the Appropriations.

The Court should consider the larger ramifications of Planned Parenthood's litigation "strategy." Planned Parenthood not only seeks to obtain state family planning funds in violation of Missouri law. It also hopes to persuade this Court that the State cannot pursue a lawsuit to prevent Planned Parenthood from obtaining such funds illegally. Indeed, the upshot of Planned Parenthood's submission is that the State has no power to enforce the rule of law as it applies to Planned Parenthood.

There is no serious dispute that Planned Parenthood failed to comply with the eligibility requirements of the Appropriations. Planned Parenthood could easily have complied, but voluntarily chose not to do so. All other organizations that receive public funds of any kind must comply with the conditions for receiving those funds. The rule of law must apply to Planned Parenthood in the same manner that it applies to all other family planning funds recipients.

JURISDICTIONAL STATEMENT

This Court has exclusive appellate jurisdiction over this case pursuant to Article V, Section 3 of the Missouri Constitution because this case involves the validity of two statutes—House Bill No. 10, § 10.705 (1999), and House Bill No. 1110, § 10.710 (2000).

STATEMENT OF FACTS

A. The Parties

Plaintiff the State of Missouri (the "State"), through the undersigned Special Assistant Attorney General ("SAAG"), brought this action to protect and enforce its rights and interests in its family planning program. PRLF 14, 50-54.[1] The Missouri Attorney General appointed Jordan B. Cherrick, a partner in the law firm of Thompson Coburn LLP, as a special assistant attorney general to represent the State in this litigation concerning House Bill No. 10, § 10.705 (1999) and House Bill No. 1110, § 10.710 (2000). PRLF 14, 50-54, 56; A18-22.

Defendants Planned Parenthood of Kansas and Mid-Missouri ("PPKM") and Planned Parenthood of the St. Louis Region ("PPSLR") provide health-related services in clinics operated in Missouri. PRLF 14-15, 56. PPKM and PPSLR are referred to collectively in this brief as "Planned Parenthood." The name "Planned Parenthood" is a registered trademark. LF 350, 359, 1793, 1797.

Defendant Maureen Dempsey, M.D., is the Director (the "Director") of the Missouri Department of Health (the "Department") and was joined in this action as a defendant in her official capacity at the insistence of Planned Parenthood. PRLF 15, 57.

[1] Citations to "PRLF" are to the Post-Remand Legal File that Planned Parenthood filed in the present appeal. Citations to "LF" and "SLF" are to the Legal File and the Supplemental Legal File filed during the previous appeal before this Court (No. SC82226). Citations to "A" are to the Appendix to this brief.

The State did not name the Director as a defendant in its original Petition. Id. On August 2, 1999, Planned Parenthood filed a Motion to Join the Director as a defendant. Id. The Director consented to her being joined as a defendant and the State did not object. Id. On August 6, 1999, the Court granted the motion and ordered that the Director be joined as a defendant. Id.

The State has since voluntarily dismissed without prejudice its claims against the Director. PRLF 7-8, 15, 57. The State does not assert any claims against the Director in its Second Amended Petition. PRLF 14-24.

B. The State Family Planning Program

Since 1993, the General Assembly has appropriated state funds to the Department on a yearly basis for the purpose of funding family planning services. PRLF15, 57. The Director enters into contracts with private and public providers to provide such family planning services. Id. In the annual appropriations, the General Assembly has consistently prohibited the use of state family planning funds to perform or promote abortions. PRLF 16, 57.

C. House Bill No. 10, § 10.705 (1999) and House Bill No. 1110, § 10.710 (2000) (the "Appropriations")

The General Assembly enacted House Bill No. 10, § 10.705 and House Bill No. 1110, § 10.710, in 1999 and 2000, respectively. Section 10.705 (1999) appropriated state funds for fiscal year 2000 (July 1, 1999 to June 30, 2000) and Section 10.710 (2000) appropriated state funds for fiscal year 2001 (July 1, 2000 to June 30, 2001) to the Department "[f]or the purpose of funding family planning services, pregnancy testing and

follow up services, provided that none of the funds appropriated herein may be expended to directly or indirectly subsidize abortion services or administrative expenses." PRLF 16, 39-49, 57; A7-17. Section 10.705 (1999) and Section 10.710 (2000) are referred to collectively in this brief as the "Appropriations." The Appropriations have expired. See RSMo § 33.065 ("every appropriation shall expire two months after the end of the period for which made").[2]

Subsection 1 of the Appropriations stated: "Abortion services include performing, assisting with, or directly referring for abortions, or encouraging or counseling patients to have abortions." PRLF 41, 46; A9, 14. Subsection 1 also provided: "An organization that receives these funds may not directly refer patients who seek abortion services to any organization that provides abortion services, including its own independent affiliate." PRLF 16, 41, 46, 57; A9, 14. Subsection 1 further provided: "An organization that receives these funds may not display or distribute marketing materials about abortion services to patients." PRLF 16, 42, 46, 57; A10, 14.

[2] This case, however, is not moot because the Circuit Court ordered Planned Parenthood to repay funds it received under § 10.705 (1999), Planned Parenthood claims that it is entitled to funds for services performed while § 10.710 (2000) was in effect, and the subsequent family planning appropriation for fiscal year 2002 (House Bill No. 10, § 10.710 (2001)) is similar to the Appropriations.

Subsection 1 of the Appropriations provided that organizations affiliated with abortion providers were still eligible to receive state family planning funds under certain conditions:

> An otherwise qualified organization shall not be disqualified from receipt of these funds because of its affiliation with an organization that provides abortion services, provided that the affiliated organization that provides abortion services is independent as determined by the conditions set forth in this section. To ensure that the state does not lend its imprimatur to abortion services, and to ensure that an organization that provides abortion services does not receive a direct or indirect economic or marketing benefit from these funds, an organization that receives these funds and its independent affiliate that provides abortion services may not share any of the following:
>
> (a) The same or similar name;
>
> (b) Medical or non-medical facilities, including but not limited to business offices, treatment, consultation, examination, and waiting rooms;
>
> (c) Expenses;
>
> (d) Employee wages or salaries; or
>
> (e) Equipment or supplies, including but not limited to computers, telephone systems, telecommunications equipment and office supplies.

> An independent affiliate that provides abortion services must be separately incorporated from any organization that receives these funds. . . .

PRLF 17, 42, 46-47, 57; A10, 14-15.

Subsection 1 of the Appropriations also provided: "Nothing in this subsection requires an organization receiving federal funds pursuant to Title X of the Public Health Service Act to refrain from performing any service that must or shall be provided pursuant to Title X or the Title X Program Guidelines for Project Grants for Family Planning Services as published by the U.S. Department of Health and Human Services as such laws and guidelines are currently in effect." PRLF 17, 42, 47, 57; A10, 15.

D. The Director's Contract Amendments

On June 25, 1999, the Director distributed the Missouri Department of Health Program Services Contract Amendment ("Contract Amendment") to family planning providers. PRLF 18, 57. The Contract Amendment extended the Department's contracts with family planning providers from July 1, 1999 through August 31, 1999. Id.

Section 4.4.2.2 of the Contract Amendment stated in part:

> To ensure that an organization that provides abortion services does not receive a direct or indirect economic or marketing benefit from these funds, an organization that receives these funds and its independent affiliate that provides abortion services may not share any of the following:
>
> - The same or similar name under applicable corporation statutes of Missouri or any other state in which the Contractor and affiliate are incorporated;

- Medical or non-medical facilities, including but not limited to business offices, treatment, consultation, examination, and waiting rooms;
- Expenses;
- Employee wages or salaries;
- Equipment or supplies, including but not limited to computers, telephone systems telecommunications equipment and office supplies.

4.4.2.2.1 "Share" is defined as services, employees, or equipment that are provided or paid for by the family planning contractor on behalf of the independent affiliate that provides abortion services without payment or financial reimbursement from the independent affiliate who provides abortion services. This will ensure that none of the state family planning funds may go directly or indirectly to the independent affiliate that provides abortion services.

LF 347-48, 1178-79, 1792, 2037.

Planned Parenthood executed Contract Amendments. PRLF 18, 57.

E. The Director's Invitation for Bid

In July or August 1999, the Director distributed an Invitation for Bid ("IFB") to family planning providers to provide family planning services from September 1, 1999 to

June 30, 2000. PRLF 18, 57. Section 4.4.2.2 of the IFB was identical to Section 4.4.2.2 of the Contract Amendments (quoted above). LF 348-49, 1193-94, 1792-93, 2038.

Planned Parenthood submitted IFBs, which the Director accepted. PRLF 18, 57. Planned Parenthood received state family planning funds under § 10.705 (1999). Id.

F. Planned Parenthood's Ineligibility to Receive State Family Planning Funds

The issue in the present case is whether Planned Parenthood of Kansas and Mid-Missouri and Planned Parenthood of the St. Louis Region were eligible under the Appropriations to receive state family planning funds. The State maintains that neither Planned Parenthood entity was eligible to receive such funds because each entity directly referred patients to abortion providers, distributed marketing materials about abortion services to patients, assisted and counseled patients to have abortions, and shared a similar name, facilities, expenses, employee wages and salaries, and equipment with its affiliated abortion providers.

1. Planned Parenthood of the St. Louis Region (PPSLR)

PPSLR is affiliated with Reproductive Health Services of Planned Parenthood of the St. Louis Region ("Reproductive Health"). PRLF 18, 57. Reproductive Health provides abortion services. Id.

a. Shared Facilities

PPSLR owns a building at 4251 Forest Park Avenue in St. Louis (the "Forest Park Facility"). PRLF 19, 58. In May 1998, PPSLR consolidated its administrative headquarters, the Central West End Health Center (one of its health centers), and

Reproductive Health into the Forest Park Facility. Id. The consolidation was performed, in part, because of "fiscal efficiency." Id. Paula Gianino, PPSLR's President, testified in deposition that the decision to consolidate was a "slam dunk business decision" based upon "good sound fiscal management." Id. The consolidation reduced building operating expenses for PPSLR and Reproductive Health. LF 350, 1793, 1799.

PPSLR's administrative offices, the Central West End Health Center, and Reproductive Health are each located in the Forest Park Facility. PRLF 19, 58. Reproductive Health occupies the majority of the main floor, PPSLR's administrative offices occupy the second floor, and the Central West End Health Center occupies the lower level. Id. Only the PPSLR name appears on the exterior of the Forest Park Facility. Id.

Reproductive Health and PPSLR signed a purported "Lease of Medical, Counseling and Office Space." PRLF 19, 59; LF 896-906. That lease describes the leased premises as: "Licensed Abortion Facility, office space located on the second floor and use of shared spaces to include, but not be limited to, restrooms, staff lounges, stairwells and conference rooms." PRLF 19, 59; LF 896; A43 (emphasis added).

PPSLR and Reproductive Health both use the same entrance for patients and staff, the same lobby (including the rest room), the same waiting area, and the same security area (including the metal detector and man trap) at the Forest Park Facility. PRLF 19, 59. The staff of PPSLR and the staff of Reproductive Health use the same lunch room, the same rest room, and the same locker room on the lower level of the Forest Park Facility. PRLF 20, 59. PPSLR and Reproductive Health both use the conference rooms on the

second level of the Forest Park Facility. Id. They both use common hallways and stairwells in the Forest Park Facility. Id. They use the same parking lot at the Forest Park Facility. Id.

b. Shared Expenses

Some of the expenses incurred in operating the Forest Park Facility are paid in part by PPSLR and in part by Reproductive Health. PRLF 20, 59; LF 1130. Reproductive Health and PPSLR share the expenses for various utility services at the Forest Park Facility. LF 899, 913. The purported "Lease of Medical, Counseling and Office Space" requires Reproductive Health to pay to PPSLR "pro rata share portions of all electric current, gas, water, sprinkler, alarm, telephone or other utility services furnished to the Leased Premises." PRLF 20, 59; LF 899; A46 (emphasis added).

PPSLR and Reproductive Health have the same main telephone number at the Forest Park Facility, 314-531-7526. PRLF 20, 60. The expense of operating that telephone number is paid in part by PPSLR and in part by Reproductive Health. LF 1131. Ms. Gianino testified in deposition, "The costs for operating that [telephone] system are allocated and shared." (emphasis added). PRLF 20, 60. Reproductive Health reimburses PPSLR for a pre-determined portion of the telephone expense for operation of that telephone number based upon the percentage amount of square footage of the Forest Park Facility that Reproductive Health occupies, not by the number of calls directed to Reproductive Health. LF 728-729. There is no tracking of the actual phone use by PPSLR and Reproductive Health of that main telephone number. LF 729-30.

Reproductive Health and PPSLR also share the computer services expenses for the Forest Park Facility. LF 736-37, 913; A47. PPSLR pays the computer services expenses and Reproductive Health reimburses PPSLR for a predetermined percentage of those expenses. PRLF 21, 60; LF 736-37, 913; A47. The reimbursement is not based on actual expenses incurred. LF 736-37, 913; A47.

Pursuant to a written agreement, Reproductive Health and PPSLR share other expenses, including security, cleaning, shuttle and parking, building maintenance and repair, insurance, regular trash pickup, audit fees, legal fees, printing expenses, advertising, office supplies, and various salary expenses. LF 913; A47. Reproductive Health reimburses PPSLR for a predetermined percentage of these items (called "shared expenses" by PPSLR's President), not the actual expense incurred by Reproductive Health for these items. PRLF 21, 60; LF 738, 913; A47.

c. Shared Employee Wages and Salaries

Reproductive Health has no employees, no chief executive officer, no chief financial officer, and no president, vice president, treasurer, or secretary. PRLF 21, 60. PPSLR manages the operations of Reproductive Health pursuant to a "Management Services Agreement." PRLF 21, 60; LF 893-912. That agreement provides that "[a]ll employees shall be PPSLR employees" and requires Reproductive Health to pay PPSLR for all non-medical PPSLR staff, including senior management and administrative staff, "for the time spent by PPSLR staff in performing administrative and management tasks" for Reproductive Health's business. PRLF 21, 60; LF 894; A41. All employees who

work at the Forest Park Facility, including any individuals who perform work in the course of Reproductive Health's business, are PPSLR employees. PRLF 21, 60.

Through its accounting system, and pursuant to the "Management Services Agreement," PPSLR makes pre-determined allocations of salary expenses between PPSLR and Reproductive Health. LF 354, 722-27, 1795. Ms. Gianino testified that those predetermined allocations apply to "any shared staff who work at 4251 Forest Park." PRLF 22, 61; LF 727.

d. Shared Equipment

Reproductive Health owns no equipment and has no physical assets. PRLF 22, 61. Instead, it uses equipment and supplies—including equipment and supplies used to perform abortions—owned by PPSLR. Id.

PPSLR and Reproductive Health share telephone equipment, including the use of the main telephone number for the entire Forest Park Facility. LF 1130-31. Ms. Gianino, testified in deposition that having one main number for the Forest Park Facility (instead of having separate telephone numbers for PPSLR and Reproductive Health) was a "good business decision from the point of view of managing resources." PRLF 22, 61; LF 355, 1795.

Moreover, PPSLR and Reproductive Health share computer equipment in that Reproductive Health leases computers from PPSLR. PRLF 22, 62. A staff member at Reproductive Health (although actually a PPSLR employee) has the ability to communicate via internal electronic mail with a staff member at PPSLR. Id.

Reproductive Health used PPSLR's Internet website at least until October 11, 1999. PRLF 22, 62; LF 666, 836-55, 1134.

PPSLR and Reproductive Health share various other types of "minor equipment and furniture." LF 913. Reproductive Health pays PPSLR a portion of the actual expenses that are incurred for the shared equipment based on a predetermined accounting formula. PRLF 22, 62; LF 913; A47.

e. PPSLR's Direct Referrals for Abortion

PPSLR provides referrals for abortion services. PRLF 23, 62; LF 1803. It is possible that a woman who is pregnant could leave a PPSLR health care facility with brochures about abortion, but without brochures about adoption and parenthood. PRLF 23, 62; LF 357, 1796. PPSLR does not provide to every woman who is pregnant a list of providers of all services relevant to the various options for managing a pregnancy. PRLF 23, 62; LF 1804.

PPSLR's "Pregnancy Testing Protocol" stated that when a PPSLR patient sought an abortion, the PPSLR employee should "[o]ffer her PPSLR/RHS [Reproductive Health] first." PRLF 23, 63; LF 860; A48. This Protocol further stated, "[i]f this is not workable we have other referrals on our list." Id. On October 11, 1999, PPSLR purportedly revised its Protocol "to clarify that PPSLR was not to provide direct referrals for or to 'market' abortion services." PRLF 23, 63; LF 1827.

In the St. Louis area telephone book, PPSLR advertises its main telephone number for the Forest Park Facility, 314-531-7526, as a "referral line." PRLF 23, 63, 222; LF 355, 649, 832-35, 1796. This "referral line," telephone number 314-531-7526, is the

same telephone number for Reproductive Health's listing in the Yellow Pages under the heading "Abortion Providers." PRLF 190, 223-24, 254. An individual who calls PPSLR on this "referral line" can be directly transferred to Reproductive Health through either the automated menu driven system or by a PPSLR operator. PRLF 190, 254. Indeed, when a person calls 314-531-7526, the "referral line," she first hears the following message from the automated menu driven system:

> Thank you for calling Planned Parenthood. If you know your party's extension, please dial it now. For surgical abortions or the abortion pill, counseling and tubal ligations from our affiliate Reproductive Health Services of Planned Parenthood of the St. Louis Region, press 1. For birth control, pap smears, infection checks, pregnancy testing and emergency contraception, press 2. For directions to this facility from Missouri, press 3. For direction to this facility from Illinois, press 4. For administration and education, press 5. For other services or assistance, press 0.

PRLF 191, 254. (The automated menu driven system contains no options for receiving information, counseling, or referrals for prenatal care or adoption.)

Information about abortion services (including appointments and fees) available at Reproductive Health appeared on the Internet website maintained by PPSLR. PRLF 23, 63; LF 666, 836-55, 1803, 1828. On October 11, 1999, PPSLR allegedly removed this information from its website. PRLF 23, 63. PPSLR's website has not contained information from any adoption provider or detailed information on the option of parenthood. LF 836-55, 1853-1905.

f. PPSLR's Abortion Marketing Materials

PPSLR distributed information cards (business cards that PPSLR circulates for a variety of purposes) that contain information about both PPSLR and Reproductive Health, including information about Reproductive Health's abortion services. PRLF 24, 63; LF 711-12, 891. On October 11, 1999, PPSLR purportedly stopped distributing these information cards until the cards were reprinted without the reference to Reproductive Health's abortion services. PRLF 24, 63.

PPSLR furnishes and makes available to patients brochures, advertisements, pamphlets, and other information regarding abortion services, including services available at Reproductive Health. LF 1133; A57. PPSLR sometimes distributes to patients who are pregnant a brochure entitled "Abortion Questions and Answers." PRLF 24, 64; LF 357, 696-97, 868-90, 1796. PPSLR has distributed to patients who are pregnant a brochure from Reproductive Health entitled "Options Counseling and Abortion Services," which contains information on abortion services and fees. PRLF 24, 64; LF 686-87, 863-66, 1804-05; A49-52. That brochure states: "PPSLR offers [abortion] procedures up to 22 weeks Last Menstrual Period (LMP) and will make a referral after that point." LF 866; A52. On October 11, 1999, PPSLR purportedly stopped distributing this brochure. PRLF 24, 64.

2. Planned Parenthood of Kansas and Mid-Missouri (PPKM)

PPKM is affiliated with Comprehensive Health Services of Planned Parenthood of Kansas and Mid-Missouri ("Comprehensive Health"). PRLF 24, 64. Comprehensive Health provides abortion services. Id.

a. Shared Facilities

PPKM owns a two-floor building at 4401 W. 109th Street in Overland Park, Kansas (the "Overland Park Facility"). PRLF 25, 64. PPKM and Comprehensive Health are both located in the Overland Park Facility. Id. Comprehensive Health occupies the first floor and PPKM occupies the second floor. Id.

b. Shared Expenses

Comprehensive Health and PPKM share the expenses for water, electricity, gas, and other utility charges incurred at the Overland Park Facility. LF 1031-34, 1059-60, 1806. PPKM pays the bills for these utility charges and Comprehensive Health pays PPKM a portion of the bills based on a predetermined formula (50 percent of each such utility charge), not Comprehensive Health's actual usage of the utility services. PRLF 25, 64. PPKM purportedly attempted to have separate utility meters installed for PPKM and Comprehensive Health at the Overland Park facility, but found that it was "cost prohibitive." Id.

c. Shared Employee Wages and Salaries

Comprehensive Health has no chief executive officer or chief financial officer. PRLF 25, 64. Instead, PPKM's CEO and CFO provide "indirect management services" to Comprehensive Health pursuant to a purported "Independent Contractor Management Agreement." PRLF 25, 64; LF 1093-99. For these "indirect management services," Comprehensive Health pays PPKM a predetermined percentage of the salary, benefits, and occupancy expenses of PPKM's CEO and CFO. LF 361, 1093-99, 1798. PPKM's

CEO and CFO do not keep track of how much time they spend working for PPKM and how much time they spend working for Comprehensive Health. Id.

Comprehensive Health has no employees that perform "direct management services," such as accounting, bookkeeping, financing reporting, and information technology services. PRLF 25-26, 65. Instead, PPKM employees perform these services for Comprehensive Health. PRLF 26, 65. Comprehensive Health pays to PPKM a portion of salary expenses of those PPKM employees who perform "direct management services" for Comprehensive Health. Id.

d. PPKM's Direct Referrals for and Assistance with Abortion

PPKM provides referrals for abortion services. PRLF 26, 65; LF 1803. PPKM requires that its employees answer a patient's questions about pregnancy options, including abortion. PRLF 26, 65. PPKM attempts to provide a woman who is pregnant with as much information as it can regarding her options, including abortion. PRLF 26, 65; LF 362, 1001, 1799. When answering telephone calls from women seeking information about abortion services, PPKM provides the requested information and gives the women the name, address, and telephone number of an abortion provider. LF 1002-03.

A woman who is pregnant could leave a PPKM health care facility with brochures about abortion, but without brochures about adoption and parenthood. PRLF 26, 66; LF 363, 1799. PPKM does not provide to every woman who is pregnant a list of providers

of all services relevant to the various choices for proceeding with a pregnancy. PRLF 26, 66; LF 1807.

PPKM sometimes distributes to patients who are pregnant an Informed Consent Form used at Comprehensive Health that Kansas law requires the patients to receive 24 hours before obtaining an abortion at Comprehensive Health. LF 983-84, 1000, 1269-71; A53-55. This form, printed with the name of Comprehensive Health at the top, is a direct referral to Comprehensive Health and assists patients in obtaining an abortion at Comprehensive Health. Id.

e. PPKM's Abortion Marketing Materials

PPKM furnishes and makes available to patients brochures, advertisements, pamphlets, and other information regarding abortion services, including services available at Comprehensive Health. LF 1152-53; A59-60. PPKM sometimes distributes to patients who are pregnant a brochure entitled "Coping Successfully After An Abortion" and/or a brochure entitled "Abortion Questions and Answers." PRLF 27, 66; LF 363, 868-90, 1272-79, 1799.

G. The Federal Litigation

1. Planned Parenthood's Federal Lawsuit

Although the Director awarded family planning contracts to Planned Parenthood under § 10.705 (1999), Planned Parenthood sued the Director in federal district court, claiming that § 10.705 (1999) violates the United States Constitution. Planned Parenthood v. Dempsey, United States District Court for the Western District of

Missouri, Western Division, Case No. 99-4145-CV-C NKL (1999). PRLF 27, 67; LF 1169-74.

2. The Initial Appointment of the Special Assistant Attorney General

The Missouri Attorney General appointed Jordan B. Cherrick as a Special Assistant Attorney General ("SAAG") to represent the State in the litigation concerning § 10.705 (1999). PRLF 27, 67; LF 560-61. In a letter dated July 29, 1999, the Attorney General withdrew his previous appointment letter of July 1, 1999 and appointed Mr. Cherrick "as a special assistant attorney general for the purpose of filing a motion to intervene on behalf of the State of Missouri" in the federal litigation and defending the constitutionality of § 10.705 (1999) in the federal litigation. Id. The July 29, 1999 letter also appointed Mr. Cherrick: "as a special assistant attorney general for the limited purpose of pursuing an action in a circuit court of the State of Missouri, on behalf of the State of Missouri, against Planned Parenthood challenging Planned Parenthood's right to receive family planning funds under House Bill 10, § 10.705 and to defend the constitutionality of § 10.705." Id.

3. The Proceedings in the Federal Litigation

The State, through the SAAG, moved to intervene in the federal litigation to represent the State's interests and to defend § 10.705 (1999). Without ruling on the State's motion, the federal district court granted Planned Parenthood's motion to abstain and stayed the federal case based on Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941), with a reservation of rights under England v. Louisiana State Bd. of Medical

Examiners, 375 U.S. 411 (1964). PRLF 28, 67; LF 1175. Although the federal district court stated that it reserved the right to determine the constitutional claims at the conclusion of the present case, the State asserts that the federal district court should have abstained under Younger v. Harris, 401 U.S. 37 (1971), and permitted the Missouri courts to decide all of the questions presented, both state and federal. PRLF 28. The federal district court has continued its stay of the federal litigation until March 8, 2002, but has indicated that it will grant no further stays.

H. The State Litigation

1. The State's Lawsuit to Enjoin Planned Parenthood from Receiving State Family Planning Funds

The SAAG commenced the present case against Planned Parenthood on behalf of the State to enjoin Planned Parenthood from receiving state family planning funds because Planned Parenthood did not satisfy the eligibility requirements of § 10.705 (1999). In its petition, the State requested a declaration that Planned Parenthood was ineligible under § 10.705 (1999) to receive such funds and that the eligibility requirements of § 10.705 (1999) are constitutional under the United States Constitution and the Missouri Constitution. PRLF 28-29, 67; LF 1-28. The State also requested the Circuit Court to issue a temporary restraining order precluding Planned Parenthood from receiving state family planning funds. L.F. 29-39.

2. Planned Parenthood Moves to Join the Director as a Necessary Party Defendant

Planned Parenthood moved to join the Director as a necessary party defendant in the present litigation. PRLF 29, 67. The Director consented to her being joined as a defendant. Id.

3. The State's First Amended Petition

Because Planned Parenthood, with the Director's consent, had moved to join the Director as a party defendant, the State filed a First Amended Petition asserting claims against both Planned Parenthood and the Director. LF 115-48. In addition to the relief sought in its original petition, the State sought to enjoin the Director from distributing state family planning funds to Planned Parenthood. PRLF 29, 67; LF 115-48.

4. The Circuit Court's Judgment and Injunction of November 16, 1999

On November 16, 1999, the Circuit Court of Cole County entered judgment in favor of the State and against Planned Parenthood and the Director. PRLF 29, 67; LF 2115-19. The Circuit Court ruled that Planned Parenthood was ineligible to receive state family planning funds because Planned Parenthood directly referred patients to abortion providers, distributed marketing materials about abortion services to patients, and shared a similar name, facilities, expenses, employee wages and salaries, and equipment with its affiliated abortion providers. LF 2115-19. The Circuit Court enjoined Planned Parenthood from receiving state family planning funds, enjoined the Director from distributing state family planning funds to Planned Parenthood, ordered Planned

Parenthood to repay state family planning funds that it had received from the Director during fiscal year 1999-2000, and ordered the Director to comply with the plain language of § 10.705 (1999). Id. The Circuit Court also ruled that § 10.705 (1999) did not violate the United States Constitution or the Missouri Constitution. Id.

5. This Court's Decision in the First Appeal

On January 31, 2001, this Court vacated the Circuit Court's judgment and remanded this case to the Circuit Court for further consideration. This Court directed the Circuit Court to determine whether the Attorney General gave the SAAG the authority to pursue claims on behalf of the State against the Director and to consider new Title X regulations that the United States Department of Health and Human Services promulgated and that took effect in July 2000. See State v. Planned Parenthood of Kansas and Mid-Missouri, 37 S.W.3d 222 (Mo. banc 2001).

I. The New Appointment of the Special Assistant Attorney General

On February 26, 2001, the Missouri Attorney General issued a new appointment letter to the SAAG (Mr. Cherrick). PRLF 30, 50-52, 68; A18-20. The Attorney General acknowledged that the SAAG had acted within the authority of his engagement in pursuing the State's claims against the Director. PRLF 51; A19. However, in his February 26, 2001 appointment letter, the Attorney General withdrew the SAAG's authority to pursue any claims on behalf of the State against the Director and directed the SAAG to dismiss without prejudice the State's claims against the Director, which the SAAG did. PRLF 7-8, 15, 51, 57; A19.

In his February 26, 2001 appointment letter, the Attorney General appointed the SAAG "to (1) appear on behalf of the State of Missouri for the purpose of defending the constitutionality of House Bill 10, § 10.705 in *Planned Parenthood of Kansas and Mid-Missouri, Inc., et al. v. Dempsey*, U.S. District Court for the Western District of Missouri Case No. 99-4145-CV-C-5; and (2) pursue, on remand from the Missouri Supreme Court in Case No. SC 82226, the action filed against Planned Parenthood of Kansas and Mid-Missouri and Planned Parenthood of the St. Louis Region by the State of Missouri in Cole County Circuit Court in Case No. CV199-1010CC for the purpose of establishing the constitutionality of House Bill 10, § 10.705." PRLF 50; A18.

On March 9, 2001, the Missouri Attorney General issued a letter to the SAAG amending the Attorney General's appointment letter of February 26, 2001. PRLF 31, 53-54, 68; A21-22. In his March 9, 2001 letter, the Attorney General stated that the SAAG continues to possess all authority conferred by the February 26, 2001 letter and further authorized the SAAG to pursue the following claims on behalf of the State against Planned Parenthood:

A. A claim for declaratory judgment that Planned Parenthood was not eligible to receive family planning funds under House Bill No. 10, § 10.705 (1999);

B. A claim for injunction to enjoin Planned Parenthood from receiving state family planning funds under House Bill No. 10, § 10.705 (1999);

C. A claim to recover the family planning funds that Planned Parenthood received under House Bill No. 10, § 10.705 (1999);

D. A claim for declaratory judgment that Planned Parenthood is not presently eligible to receive family planning funds under House Bill No. 1110, § 10.710 (2000);

E. A claim for injunction to enjoin Planned Parenthood from receiving state family planning funds until it complies with the eligibility requirements of House Bill No. 1110, § 10.710 (2000);

F. A claim to recover any family planning funds that Planned Parenthood receives under House Bill No. 1110, § 10.710 (2000) until the circuit court enters its judgment.

Id.

J. The State's Second Amended Petition

Following this Court's decision in the first appeal, the State filed its Second Amended Petition. PRLF 14-54. The Second Amended Petition asserts against Planned Parenthood the very claims that the Attorney General has authorized the SAAG to pursue on behalf of the State. The Second Amended Petition challenges Planned Parenthood's eligibility to receive state family planning funds under the Appropriations. The Second Amended Petition does not assert any claims against the Director. The State dismissed its claims against the Director without prejudice. PRLF 7-8.

K. The Circuit Court's Judgment of May 30, 2001

On May 30, 2001, the Circuit Court again entered Judgment in favor of the State and against Planned Parenthood. PRLF 359-64; A1-6. Consistent with this Court's Opinion in the previous appeal in this case, the Circuit Court reconsidered the extent of the authority that the Attorney General granted to the SAAG to pursue the claims in this action and reconsidered its previous judgment in light of the regulations governing the federal Title X program. PRLF 359; A1.

The Circuit Court ruled that the State has the authority to pursue the claims in its Second Amended Petition against Planned Parenthood and that these claims are justiciable. PRLF 359-60; A1-2. Consistent with its previous judgment, the Circuit Court also ruled that Planned Parenthood was not eligible to receive state family planning funds appropriated by the Appropriations because Planned Parenthood shared a similar name with its affiliated abortion providers and shared facilities, expenses, employee wages or salaries, and equipment with its affiliated abortion providers. PRLF 361; A3.

The Circuit Court also found that Planned Parenthood directly referred patients to abortion providers, including its affiliated abortion providers, distributed marketing materials about abortion services to patients, and counseled patients to have abortions. PRLF 361; A3. However, the Circuit Court concluded that the federal Title X program required Planned Parenthood to perform the services, as set forth in the record before the Circuit Court, that constituted the direct referral of patients to abortion providers, the distribution of marketing materials about abortion services to patients, and the counseling of patients to have abortions. Id. Accordingly, the Circuit Court held that Planned

Parenthood's performance of the services, as set forth in the record before the Circuit Court, that constituted the direct referral of patients to abortion providers, the distribution of marketing materials about abortion services to patients, and the counseling of patients to have abortions did not render Planned Parenthood ineligible to receive state family planning funds appropriated by the Appropriations. PRLF 361-62; A3-4.

The Circuit Court noted, however, that nothing in the federal Title X program requires Planned Parenthood to share a similar name with its affiliated abortion providers or to share facilities, expenses, employee wages or salaries, or equipment with its affiliated abortion providers. PRLF 362; A4. Accordingly, the Circuit Court ruled that, notwithstanding the federal Title X program, Planned Parenthood was not eligible to receive state family planning funds appropriated by the Appropriations. Id.

Additionally, the Circuit Court held that the Appropriations did not violate the United States Constitution or the Missouri Constitution. PRLF 362; A4.

Based on its findings and conclusions, the Circuit Court permanently enjoined Planned Parenthood from receiving state family planning funds appropriated by the Appropriations and ordered Planned Parenthood to repay to the State the $105,750.00 in funds that it received under § 10.705 (1999) and any funds that it received under § 10.710 (2000) (which Planned Parenthood claims to be none). PRLF 363; A5.

Planned Parenthood filed a timely notice of appeal on July 6, 2001. PRLF 365-376. The State filed a timely notice of cross-appeal from the Circuit Court's ruling in favor of Planned Parenthood with respect to the Title X issues. PRLF 397-408.

L. Planned Parenthood's Motion for Preliminary Injunction in the Federal Litigation

Notwithstanding the stay in the federal litigation, on July 13, 2001, Planned Parenthood filed a motion for preliminary injunction in the federal litigation. A23-26.[3] Planned Parenthood claimed that it provided family planning services in May and June 2001 pursuant to a contract with the Department and that it sought reimbursement from the Department in the amount of $57,600. Id. Planned Parenthood asked the federal district court to enter a preliminary injunction against the Department precluding

[3] In light of the fact that Planned Parenthood has attached to its brief and is relying on materials outside of the record before the Circuit Court—namely a letter dated August 2, 2001, from the United States Department of Health and Human Services to the Missouri Family Health Council, Inc., and a letter dated August 8, 2001, from the Missouri Department of Health to the Missouri Family Health Council, Inc.—the State should likewise be entitled to attach to its brief and rely on papers that Planned Parenthood filed in the federal litigation after the Circuit Court rendered its Judgment on May 30, 2001. To the extent necessary, the State seeks leave to supplement the record on appeal with these public documents—Planned Parenthood's motion for preliminary injunction and the Declaration of Peter Brownlie—and requests that this Court take judicial notice of these papers, which are a part of the official judicial record in the federal litigation and contain binding admissions upon Planned Parenthood. These papers are contained in the State's Appendix at A23-39.

application of RSMo § 33.065 (the appropriation lapsing statute) to a sufficient amount of funds to reimburse Planned Parenthood's $57,600 claim in the event that Planned Parenthood ultimately is found to have been eligible to receive state family planning funds under § 10.710 (2000). Id. Planned Parenthood withdrew its motion for preliminary injunction shortly after filing it.

Planned Parenthood submitted the Declaration of Peter Brownlie, President and Chief Executive Officer of PPKM, in support of its preliminary injunction motion. In his declaration, Mr. Brownlie stated that to comply with the Appropriations as construed by the Circuit Court, "Comprehensive Health would have to change its name to eliminate any indication of its "affiliation" with PPKM. This would require at minimum elimination of the words 'Planned Parenthood.'" A31. He further stated: "Comprehensive Health would have to delete the words 'Planned Parenthood' from its name, thereby removing the ability of PPKM to be publicly identified with Comprehensive Health and the work it does in fulfillment of PPKM's mission." A38. He complained about the effects of having to change the name of Comprehensive Health:

> 19. Planned Parenthood, however, is a very widely recognized and respected name. Further, it is a name that stands for something in the minds of most Americans: reliable and high quality, affordable, confidential reproductive health services, plus a commitment to public advocacy and education to protect safe and legal access to those services, including abortion.

> 20. The work of Comprehensive Health, specifically the provision of abortions, is thus integral to PPKM's mission and the support PPKM enjoys in its community. Compelling the "de-linking" of the names of PPKM and Comprehensive Health would not only undercut that support, but would deprive PPKM of its ability to be associated in the minds of the public with Comprehensive Health and the work it does in fulfillment of PPKM's mission.

A31-32.

Mr. Brownlie further stated that Comprehensive Health's occupancy costs would increase by $850,000 plus at least $80,000 per year if it had to occupy medical office space outside of the Overland Park Facility, thereby demonstrating that Comprehensive Health's sharing of the Overland Park Facility with PPKM has resulted in substantial cost savings to Comprehensive Health. A33. He also stated that Comprehensive Health's personnel expenses would increase by $144,000 if it had to hire its own management employees, thereby demonstrating that Comprehensive Health's sharing of employee salaries and wages with PPKM has resulted in substantial costs savings to Comprehensive Health. A37. Additionally, Mr. Brownlie stated that the increased costs that Comprehensive Health will incur if it cannot share the Overland Park Facility and employee salaries and wages with PPKM will "result in an increase of approximately $51, or approximately 15% of the price of a first trimester abortion." A39.

POINTS RELIED ON

I. The Circuit Court Correctly Declared That Planned Parenthood Was Ineligible Under the Appropriations to Receive State Family Planning Funds, Correctly Enjoined Planned Parenthood from Receiving State Family Planning Funds, and Correctly Ordered Planned Parenthood to Repay the State Family Planning Funds It Had Received Because Planned Parenthood Was Ineligible Under the Appropriations to Receive State Family Planning Funds in That It Is Undisputed That Planned Parenthood Shared a Similar Name, Facilities, Expenses, Employee Wages and Salaries, and Equipment with Its Affiliated Abortion Providers

House Bill No. 10, § 10.705 (1999)

House Bill No. 1110, § 10.710 (2000)

II. The Circuit Court Correctly Found That Planned Parenthood Directly Referred Patients to Abortion Providers, Distributed Marketing Materials About Abortion Services to Patients, and Counseled Patients to Have Abortions

House Bill No. 10, § 10.705 (1999)

House Bill No. 1110, § 10.710 (2000)

III. The Circuit Court Erred in Concluding That the Federal Title X Program Required Planned Parenthood to Perform the Services That Constituted the Direct Referral of Patients to Abortion Providers, the Distribution of Marketing Materials About Abortion Services to Patients, and the Assistance and Counseling of Patients to Have Abortions and, Consequently, in Ruling That Planned Parenthood's

Abortion Referral, Marketing, Assistance, and Counseling Activities Did Not Render Planned Parenthood Ineligible Under the Appropriations to Receive State Family Planning Funds Because the Appropriations Prohibited Such Activities and Nothing in the Federal Title X Program Required Planned Parenthood to Perform Any Activities Prohibited by the Appropriations and, in Any Event, the Title X Regulations Did Not Mandate Planned Parenthood's Abortion Referral, Marketing, Assistance, and Counseling Activities

42 C.F.R. § 59.5

IV. The Circuit Court Correctly Ruled That Planned Parenthood Was Ineligible to Receive State Family Planning Funds and Correctly Refused to Give Planned Parenthood Additional Time to Comply with the Appropriations Because the Missouri Constitution Precluded Planned Parenthood from Receiving or Retaining Any State Family Planning Funds at Any Time During Which Planned Parenthood Was Ineligible Under the Appropriations to Receive Such Funds

State ex inf. Danforth v. Merrell, 530 S.W.2d 209 (Mo. banc 1975)

Rivers v. Roadway Exp., Inc., 511 U.S. 298 (1994)

Asbury v. Lombardi, 846 S.W.2d 196 (Mo. banc 1993)

V. The Circuit Court Correctly Required Planned Parenthood to Return to the State the Family Planning Funds That Planned Parenthood Received Under § 10.705 (1999) Because It Is Not Inequitable to Require Planned Parenthood to Return the State Family Planning Funds It Improperly Received in That Planned Parenthood Was Ineligible to Receive Those Funds, Planned Parenthood

Represented to the Circuit Court That It Would Return Any Funds If the Circuit Court Ultimately Determined That Planned Parenthood Was Not Eligible to Receive Those Funds, the State Is Not Estopped to Recover Those Funds, and It Would Violate the Missouri Constitution to Allow Planned Parenthood to Retain Those Funds

Aetna Ins. Co. v. O'Malley, 124 S.W.2d 1164 (Mo. 1938)

State ex rel. Johnson v. Leggett, 359 S.W.2d 790 (Mo. 1962)

City of Washington v. Warren County, 899 S.W.2d 863 (Mo. banc 1995)

Brown v. City of Fredericktown, 886 S.W.2d 747 (Mo. App. 1994)

VI. The Circuit Court Correctly Concluded That the State Has the Authority to Pursue Against Planned Parenthood the Claims in the Second Amended Petition Because the Missouri Attorney General Has Specifically Authorized the Special Assistant Attorney General to Pursue These Claims on Behalf of the State, the Second Amended Petition Does Not Assert Any Claim or Seek Any Relief Against the Director, and Planned Parenthood's Reliance on the Director's Construction of the Appropriations Is a Defense to the State's Claims Against Planned Parenthood, Not a Claim for Relief by the State Against the Director

State v. Planned Parenthood of Kansas and Mid-Missouri,

37 S.W.3d 222 (Mo. banc 2001)

VII. The Circuit Court Correctly Concluded That the First and Second Claims in the Second Amended Petition Are Justiciable Because This Case Presents A Justiciable Controversy in That the Second Amended Petition Asserts Claims Only

Against Planned Parenthood and Not Against the Director, the Missouri Attorney General Has the Power to Sue Private Entities on Behalf of the State to Prevent Them from Unlawfully Receiving State Funds, and the Attorney General Properly Appointed the Special Assistant Attorney General, Who Is Accountable to the Attorney General, to Exercise That Power

State ex rel. Taylor v. Wade, 231 S.W.2d 179 (Mo. banc 1950)

State ex inf. McKittrick v. Murphy, 148 S.W.2d 527 (Mo. banc 1941)

State, to Use of Consol. Sch. Dist. No. 42 of Scott County v. Powell, 221 S.W.2d 508 (Mo. 1949)

State ex rel. Circuit Attorney v. Saline County Court, 51 Mo. 350 (1873)

VIII. The Circuit Court Correctly Ruled that the Appropriations Did Not Violate Article III, § 23 of the Missouri Constitution Because the Appropriations Did Not Include Legislation of a General Character, Did Not Conflict with or Amend Any General Statute, and Comported with the Requirement in Article IV, § 23 of the Missouri Constitution That an Appropriation Bill Specify the Purpose of the Appropriation

Bayne v. Secretary of State, 392 A.2d 67 (Md. 1978)

Rolla 31 School Dist. v. State, 837 S.W.2d 1 (Mo. banc 1992)

Opponents of Prison Site, Inc. v. Carnahan, 994 S.W.2d 573 (Mo. App. 1999)

State ex inf. Danforth v. Merrell, 530 S.W.2d 209 (Mo. banc 1975)

IX. The Circuit Court Correctly Considered Whether the Appropriations Violated the United States Constitution and Correctly Ruled That the Appropriations Did Not Violate the United States Constitution Because the Federal Constitutional Issue Was Before the Circuit Court and the Federal District Court's Abstention Decision Did Not Preclude the Circuit Court from Considering the Issue

England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964)

Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941)

Younger v. Harris, 401 U.S. 37 (1971)

ARGUMENT

The Standard of Review

The Circuit Court resolved this case based on the parties' dispositive motions. This Court's review is de novo. See ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). (It should be noted, however, that virtually all facts in this case are undisputed.)

I. The Circuit Court Correctly Declared That Planned Parenthood Was Ineligible Under the Appropriations to Receive State Family Planning Funds, Correctly Enjoined Planned Parenthood from Receiving State Family Planning Funds, and Correctly Ordered Planned Parenthood to Repay the State Family Planning Funds It Had Received Because Planned Parenthood Was Ineligible Under the Appropriations to Receive State Family Planning Funds in That It Is Undisputed That Planned Parenthood Shared a Similar Name, Facilities, Expenses, Employee Wages and Salaries, and Equipment with Its Affiliated Abortion Providers

Planned Parenthood next challenges the Circuit Court's conclusion that Planned Parenthood was ineligible under the Appropriations to receive state family planning funds because Planned Parenthood shared a similar name, facilities, expenses, employee wages and salaries, and equipment with its affiliated abortion providers. PRLF 361; A3. The Circuit Court's conclusion, however, was correct and should be affirmed.

A. Planned Parenthood Shared a Similar Name with Its Affiliated Abortion Providers

To be eligible under the Appropriations to receive state family planning funds, an organization such as Planned Parenthood that is affiliated with an abortion provider could not share the "same or similar name" with its affiliated abortion provider. § 10.705.1 (1999) (PRLF 42; A10); § 10.710.1 (2000) (PRLF 47; A15). "[C]ourts must give effect to the language as written." Spradlin v. City of Fulton, 982 S.W.2d 255, 261 (Mo. banc 1998). "Where the language of a statute is clear and unambiguous, we will give effect to the language as written and will not resort to statutory construction." Cantwell v. Douglas County Clerk, 988 S.W.2d 51, 54 (Mo. App. 1999) (citing M.A.B. v. Nicely, 909 S.W.2d 669, 672 (Mo. banc 1995). "Absent a statutory definition, the words used in the statute will be given their plain and ordinary meaning as derived from the dictionary." Columbia Athletic Club v. Director of Revenue, 961 S.W.2d 806, 809 (Mo. banc 1998).

Webster's Third New International Dictionary (1986) defines "similar" as "having characteristics in common: very much alike."[4] Likewise, Webster's New World Dictionary (2d college ed. 1982) defines "similar" as "nearly but not exactly the same or

[4] This Court has repeatedly relied on Webster's Third New International Dictionary to ascertain the plain and ordinary meaning of undefined words in statutes. See Hemeyer v. KRCG-TV, 6 S.W.3d 880, 881 (Mo. banc 1999); Turley v. Turley, 5 S.W.3d 162, 165 (Mo. banc 1999); American Healthcare Management, Inc. v. Director of Revenue, 984 S.W.2d 496, 498 (Mo. banc 1998).

alike; having a resemblance."[5] See also State v. Harris, 705 S.W.2d 544, 549 (Mo. App. 1986) ("similar" means "nearly corresponding; resembling in many respects; somewhat alike; have general likeness.").

Planned Parenthood of Kansas and Mid-Missouri (PPKM) is affiliated with the abortion provider Comprehensive Health Services of Planned Parenthood of Kansas and Mid-Missouri. PRLF 24, 64. Planned Parenthood of the St. Louis Region (PPSLR) is affiliated with the abortion provider Reproductive Health Services of Planned Parenthood of the St. Louis Region. PRLF 18, 57. The names of the affiliated abortion providers are very much and nearly alike, resemble, and have substantial characteristics in common with the names of PPKM and PPSLR. The abortion providers merely tack on the additional words "Comprehensive Health Services of" and "Reproductive Health Services of" in front of the exact, full names of PPKM and PPSLR, respectively. The registered trademark "Planned Parenthood" appears in the names of Planned Parenthood and their affiliated abortion providers. LF 350, 359, 1793, 1797. The Circuit Court correctly found that Planned Parenthood shared a similar name with its affiliated abortion providers, thereby rendering it ineligible to receive state family planning funds under the Appropriations.

[5] Missouri courts have also repeatedly relied on Webster's New World Dictionary. See Green v. Unity Sch. of Christianity, 991 S.W.2d 201, 206 (Mo. App. 1999); State v. Hofmann, 895 S.W.2d 108, 112 (Mo. App. 1995); Dunn v. Bemor Petroleum, 737 S.W.2d 187, 189 (Mo. banc 1987).

The General Assembly's purpose in prohibiting fund recipients and their affiliated abortion providers from sharing "the same or similar name" was to "ensure that the state does not lend its imprimatur to abortion services, and to ensure that an organization that provides abortion services does not receive a direct or indirect economic or marketing benefit" from state family planning funds. § 10.705.1 (1999) (PRLF 42; A10); § 10.710.1 (2000) (PRLF 46-47; A14-15). Planned Parenthood's affiliated abortion providers receive economic and marketing benefits by sharing the name "Planned Parenthood" with Planned Parenthood. This trademarked name, by definition, has substantial marketing value as a provider of abortions. Otherwise, there would be no reason to include the name "Planned Parenthood" in the corporate names of the affiliated abortion providers. As apparent from the declaration of Mr. Brownlie (PPKM's President and CEO) in the federal litigation, Planned Parenthood has purposely linked its name with the names of its affiliated abortion providers so that Planned Parenthood will be "associated in the minds of the public with [its affiliated abortion providers] and the work [they do] in fulfillment of [Planned Parenthood's] mission" to provide abortions. A31-32.

A woman receiving services at a "Planned Parenthood" entity will recognize the name of a "Planned Parenthood" abortion provider. Indeed, Mr. Brownlie testified in the federal litigation: "Planned Parenthood [ ] is a very widely recognized … name. [I]t is a name that stands for something in the minds of most Americans: reliable and high quality, affordable, confidential reproductive health services, plus a commitment to public advocacy and education to protect safe and legal access to those services,

including abortion." A31-32. Contrary to the stated purpose of the Appropriations, the receipt of state family planning funds by Planned Parenthood would have lent the State's imprimatur to abortion services and provided Planned Parenthood's affiliated abortion providers with economic and marketing benefits.

For its defense, Planned Parenthood relies on the Director's construction of "same or similar name." As a general rule, "[t]he interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." Linton v. Missouri Veterinary Medical Bd., 988 S.W.2d 513, 517 (Mo. banc 1999) (quotations omitted). "However, when an administrative agency's decision is based on the agency's interpretations of law, the reviewing court must exercise unrestricted, independent judgment and correct erroneous interpretations." Burlington Northern R.R. v. Director of Revenue, 785 S.W.2d 272, 273 (Mo. banc 1990). "[I]n reviewing an agency's interpretation, the courts must be vigilant in determining whether the agency has not exceeded the authority delegated to it by the General Assembly and must not, in the name of deference, accede to an agency's arbitrary action." Savannah R-III School Dist. v. Public School Retirement System of Missouri, 912 S.W.2d 574, 576 (Mo. App. 1995) (declining to defer to agency's interpretation of statute because interpretation conflicted with plain meaning of statute). For good reason, Missouri courts do not defer to administrative interpretations that conflict with a statute's plain meaning or the General Assembly's intent. Blue Springs Bowl v. Spradling, 551 S.W.2d 596, 600 (Mo. banc 1977) ("The plain and unambiguous language of the statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that

expressed in clear and unambiguous language in the statute."). Otherwise, administrative agencies could rewrite statutes to their liking under the guise of "interpretation."

The Director defined the term "similar name" by reference to Missouri's corporation statutes. LF 1178, 1193. In other words, the Director maintained that if the Missouri Secretary of State would register the formal corporate names of both the family planning funds recipient and its affiliated abortion provider, then the recipient did not share a "similar name" with its affiliated abortion provider for purposes of the Appropriations. The Director's interpretation of "similar name" conflicts with the plain language and intent of the Appropriations.

First, by relying solely on Missouri's corporation statutes, the Director's definition failed to give any effect to the word "similar" in the Appropriations. Missouri's corporation statutes provide:

> The corporate name:
>
> * * *
>
> (3) Shall be distinguishable from the name of any domestic corporation existing under any law of this state or any foreign corporation authorized to transact business in this state, or any limited partnership or limited liability company existing or transacting business in this state under chapter 347, RSMo, and chapter 359, RSMo, or a name the exclusive right to which is, at the time, reserved in the manner provided in this chapter, chapter 347, RSMo, or chapter 359, RSMo. <u>If the name is the same, a word</u>

shall be added to make such name distinguishable from the name of such other corporation, limited liability company or limited partnership.

RSMo § 351.110(3) (emphasis added). In effect, Missouri's corporation statutes only prohibit corporations from having the same names and do not prohibit corporations from having similar names. Indeed, a proposed name of a new corporation is acceptable if merely one word is added to a name belonging to an existing corporation. Id.

Second, the Director's proposed definition of the word "similar" runs afoul of the fundamental rule of statutory construction that every word of a legislative enactment must be given meaning. Spradlin, 982 S.W.2d at 262 ("Traditional rules of statutory construction require every word of a legislative enactment be given meaning."); Staley v. Missouri Director of Revenue, 623 S.W.2d 246, 250 (Mo. banc 1981) ("All provisions of a statute must be harmonized and every word, clause, sentence, and section thereof must be given some meaning."). Subsection 1 of the Appropriations required that "[a]n independent affiliate that provides abortion services must be separately incorporated from any organization that receives these funds." To be separately incorporated, an independent affiliate must comply with Missouri's corporation statutes, including the requirement of selecting an eligible corporate name. See RSMo §§ 349.035 and 351.110. Thus, a separate, independent provision of the Appropriations already required compliance with Missouri's corporation statutes regarding corporate names. The provision of the Appropriations that precluded a fund recipient from sharing "the same or similar name" with its affiliated abortion provider would have been redundant and

meaningless if it required nothing more than what the "separately incorporated" provision of the Appropriations already required.

Third, if the Director's reliance on Missouri's corporation statutes to define "same or similar name" were accepted, an organization that did business under the same name as its affiliated abortion provider would have been eligible to receive state family planning funds so long as the formal corporate names of the organization and the abortion provider were different. Under Missouri law, corporations may do business under names other than their formal corporate names. For example, although Planned Parenthood of the St. Louis Region and Reproductive Health of Planned Parenthood of the St. Louis Region are separately incorporated, both conduct business under the same name "Planned Parenthood." Indeed, they share the same main telephone number and when a person calls that number, regardless of whether they intend to reach PPSLR or Reproductive Health, the first words from the automated menu driven system are: "Thank you for calling Planned Parenthood." PRLF 20, 60, 191, 254. Although this type of business operation does not violate Missouri's corporation statutes, it clearly contravenes the General Assembly's intent in precluding recipients of state family planning funds from sharing the same or similar name with their affiliated abortion providers.

In sum, Planned Parenthood shared a similar name with its affiliated abortion providers. For this reason alone, the Circuit Court correctly found that Planned Parenthood was ineligible under the Appropriations to receive state family planning funds.

B. Planned Parenthood Shared Facilities, Expenses, Employee Wages and Salaries, and Equipment with Its Affiliated Abortion Providers

To be eligible under the Appropriations to receive state family planning funds, an organization such as Planned Parenthood that is affiliated with an abortion provider could not "share" facilities, expenses, employee wages and salaries, or equipment with its affiliated abortion provider. § 10.705 (1999) (PRLF 42; A10); § 10.710 (2000) (PRLF 47; A15). Webster's Third New International Dictionary (1986) defines "share" as "1. to divide and distribute in portions : APPORTION, DIVIDE; 2. to partake of, use, experience, or enjoy with others : have a portion of; … 4. to participate in, take, possess, or undergo in common." Similarly, Webster's New World Dictionary (2d college ed. 1982) defines "share" as "to receive, use, experience, enjoy, endure, etc. in common with another or others." See also Ragsdale v. Tom-Boy, Inc., 317 S.W.2d 679, 686 (Mo. App. 1958) ("ordinarily the verb 'share' is defined as meaning to partake of or enjoy with others; to have a portion of or to participate in"); RANDOM HOUSE THESAURUS (college ed. 1984) (synonyms for "share" include "use jointly," "split," "apportion," and "allocate").

As set forth in the Statement of Facts, the undisputed evidence reveals that under the plain and ordinary meaning of "share," Planned Parenthood and its affiliated abortion providers "shared" facilities, expenses, employee wages and salaries, and equipment, thereby rendering Planned Parenthood ineligible under the Appropriations to receive state family planning funds.

1. Sharing of Facilities

Planned Parenthood and its affiliated abortion providers shared facilities. A "facility" is defined as a "building, special room, etc. that facilitates or makes possible some activity." WEBSTER'S NEW WORLD DICTIONARY (2d college ed. 1982); see also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) (defining "facility" as "something (as a hospital, machinery, plumbing, that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end"); Hadel v. Bd. of Educ. of Sch. Dist. of Springfield, 990 S.W.2d 107, 115 (Mo. App. 1999 ("'Facility' means 'something (as a hospital) that is built ....'"). It is undisputed that Planned Parenthood and its affiliated abortion providers used and shared the same buildings, which Planned Parenthood owned, and that they alone occupied those buildings. Planned Parenthoods' Br., pp. 29-30.[6] PPSLR and Reproductive Health both

[6] This is not to say that a state family planning funds recipient and its affiliated abortion provider always share "facilities" within the meaning of the Appropriations whenever they occupy space in the same building. If they both leased separate space in a building owned by an unrelated person or entity and containing other unrelated tenants, then their presence in the same building would not constitute an impermissible sharing of "facilities" under the Appropriations if no economic benefits flow between them as a result of their dual presence in the same building. However, in the present case, the buildings used by Planned Parenthood and its affiliated abortion providers were owned by Planned Parenthood and Planned Parenthood and its affiliated abortion were the sole

used, occupied, and shared the Forest Park building (a "facility") and PPKM and Comprehensive Health both used, occupied, and shared the Overland Park building (a "facility"). Id. PPSLR and Reproductive Health also shared and jointly used several portions of the Forest Park Facility, including the entrance for patients and staff, the lobby (including the rest room), the waiting area, the security area (including the metal detector and man trap), the lunch room, the rest room, the same locker room, the conference rooms, and the parking lot. See Planned Parenthood's Br., p. 30. The lease between PPSLR and Reproductive Health describes some of these areas as "shared spaces." PRLF 19, 59; LF 896; A43.

2. Sharing of Expenses

Planned Parenthood and its affiliated abortion providers shared various expenses. They share utility expenses, such as electricity, gas, water, sprinkler, alarm, telephone, and other utility services associated with the Planned Parenthood facilities. See Planned Parenthood's Br., p. 29; PRLF 20, 59-60; LF 899, 913, 1031-34, 1059-60, 1130-31, 1806. Reproductive Health and PPSLR also shared numerous other expenses, including computer services, security, cleaning, shuttle and parking, building maintenance and repair, insurance, regular trash pickup, audit fees, legal fees, printing expenses, advertising, office supplies, and various salary expenses. PRLF 21, 60; LF 736-37, 913.

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occupants of those buildings. Their joint occupancy of those buildings was an impermissible sharing of "facilities" under the Appropriations because economic benefits flowed between them as a result of their joint occupancy. See A32-36.

Planned Parenthood claims that these expenses are "apportioned" between Planned Parenthood and its affiliated abortion providers. Planned Parenthood's Br., pp. 29-30. One of the definitions of "share" in Webster's Third New International Dictionary is "to divide and distribute in portions : APPORTION, DIVIDE." See also RANDOM HOUSE THESAURUS (college ed. 1984) (synonyms for "share" include "use jointly," "split," "apportion," and "allocate"). Under the plain and ordinary meaning of "share," Planned Parenthood "shared" expenses with its affiliated abortion providers.

3. Sharing of Employee Wages and Salaries

Planned Parenthood and its affiliated abortion providers shared employee wages and salaries. Reproductive Health has no officers or employees. PRLF 21, 60. PPSLR's employees manage the operations of Reproductive Health. PRLF 21, 60; LF 893-912. All employees who work at the Forest Park facility, including any individuals who perform work in the course of Reproductive Health's business, are PPSLR employees. PRLF 21, 60.

Reproductive Health paid PPSLR for all non-medical PPSLR staff, including senior management and administrative staff, "for the time spent by PPSLR staff in performing administrative and management tasks" for Reproductive Health's business. PRLF 21, 60; LF 894. PPSLR made predetermined allocations of salary expenses between PPSLR and Reproductive Health. LF 354, 722-27, 1795. As PPSLR's President testified, those predetermined allocations applied to "any shared staff who work at" the Forest Park Facility. PRLF 22, 61; LF 727.

Comprehensive Health has no chief executive officer or chief financial officer. PRLF 25, 64. PPKM's CEO and CFO provided "indirect management services" to Comprehensive Health, for which Comprehensive Health paid PPKM a predetermined percentage of the salary, benefits, and occupancy expenses of PPKM's CEO and CFO. PRLF 25, 64; LF 361, 1093-99, 1798. PPKM's CEO and CFO did not keep track of how much time they spent working for PPKM and how much time they spent working for Comprehensive Health. LF 361, 1093-99, 1798.

Comprehensive Health has no employees that perform "direct management services," such as accounting, bookkeeping, financing reporting, and information technology services. PRLF 25-26, 65. Instead, PPKM employees performed these services for Comprehensive Health. PRLF 26, 65. Comprehensive Health paid to PPKM a portion of salary expenses of those PPKM employees who performed "direct management services" for Comprehensive Health. Id.

In sum, it is undisputed that Planned Parenthood and its affiliated abortion providers shared employee wages and salaries. Both extensively used the services of the same persons to perform their operations.

4. Sharing of Equipment

Planned Parenthood and its affiliated abortion providers also shared equipment. Reproductive Health owns no equipment and has no physical assets. PRLF 22, 61. It used equipment and supplies—including equipment and supplies used to perform abortions—owned by PPSLR. Id. PPSLR and Reproductive Health shared telephone equipment (including the use of the main telephone number for the Forest Park Facility),

computer equipment (including an internet website, at least until October 11, 1999), and other types of equipment and furniture. LF 355, 666, 836-55, 913, 1130-31, 1134, 1795, 1802-03, 1828. Reproductive Health purportedly paid PPSLR part of the actual expenses that were incurred for the shared equipment based on a predetermined accounting formula. PRLF 22, 62; LF 913.

5. Because of Planned Parenthood's Sharing of Facilities, Expenses, Employee Wages and Salaries, and Equipment with Its Affiliated Abortion Providers, Planned Parenthood's Receipt of State Family Planning Funds Would Subsidize Abortion Services

The General Assembly sought to prohibit the direct and indirect economic benefits that flow from the sharing of facilities, expense items, employee wages and salaries, and equipment. Such sharing saves the affiliated abortion providers money; otherwise, the sharing would not occur. Abortion providers receive an economic benefit when they use their family planning affiliates' equipment instead of purchasing their own equipment, when they are responsible for only a portion of fixed expenses incurred in operating a facility jointly occupied with their family planning affiliates, and when they are responsible for only a portion of the wages and salaries for the employees used jointly with their affiliated family planning provider. By providing these economic benefits to its affiliated abortion providers, Planned Parenthood, if allowed to receive state family planning funds, would effectively be using such funds to subsidize abortion services.

Indeed, Mr. Brownlie stated in his declaration in the federal litigation that Comprehensive Health's occupancy costs would increase by $850,000 plus at least $80,000 per year if it had to occupy medical office space outside of the Overland Park Facility, thereby demonstrating that Comprehensive Health's sharing of the Overland Park Facility with PPKM has resulted in substantial cost savings to Comprehensive Health. A33. (Similarly, the consolidation of PPSLR and Reproductive Health into the Forest Park Facility reduced building operating expenses for PPSLR and Reproductive Health. LF 350, 1793, 1799.) Mr. Brownlie also stated that Comprehensive Health's personnel expenses would increase by $144,000 if it had to hire its own management employees, thereby demonstrating that Comprehensive Health's sharing of employee salaries and wages with PPKM has resulted in substantial costs savings to Comprehensive Health. A37. Finally, he stated that the increased costs that Comprehensive Health will incur if it cannot share the Overland Park Facility and employee salaries and wages with PPKM will "result in an increase of approximately $51, or approximately 15% of the price of a first trimester abortion." A39. Mr. Brownlie's declaration, therefore, confirms that Planned Parenthood subsidizes its affiliated abortion providers' operations and that, in turn, any state family planning funds received by Planned Parenthood would effectively subsidize the abortion services provided by its affiliated abortion providers.

6. The Director's Interpretation of "Share" Was Contrary to Its Plain and Ordinary Meaning

Planned Parenthood complains that the Circuit Court did not accede to the Director's interpretation of "share" in the Appropriations. The Director defined the term "share" as "services, employees, or equipment that are provided or paid for by the family planning contractor on behalf of the independent affiliate that provides abortion services without payment or financial reimbursement from the independent affiliate who provides abortion services." LF 1179, 1193-94; Planned Parenthood's Br., p. 21. Nothing in the Appropriations allowed for reimbursement between a fund recipient and its affiliated abortion provider. To the contrary, the Appropriations required financial separateness.

The Director's definition of "share" was contrary to the plain and ordinary meaning of that word as found in the dictionary, merely precluded gifts from a grantee to its affiliated abortion provider, and gave no effect to "share." "Sharing" and "gifts" are distinct concepts. People "share" items even though they each contribute to the costs of the item. A driver/owner and a passenger in a car "share" the use of a car even if the passenger pays the driver/owner for gas. Similarly, persons who own interests in a time-share condominium "share" the condominium even though each person pays for his interest in and use of the condominium.

The Director apparently recognized the economic benefit that would flow from fund recipients to their affiliated abortion providers if the fund recipients were permitted to give gifts to abortion providers. The General Assembly sought to prohibit more than just the obvious economic benefits that flow from gifts. The General Assembly

prohibited all economic benefits, including the sharing of certain items, to ensure that no direct or indirect economic or marketing benefits from state family planning funds flow to abortion providers.

The General Assembly implicitly rejected an amendment to § 10.705 (1999) that would have allowed sharing of expenses, employee wages or salaries, equipment, and supplies so long as the affiliated abortion provider reimbursed the grantee. LF 1294-98. Senator Maxwell offered Senate Substitute Amendment No. 2 for Senate Amendment No. 2 to Senate Committee Substitute for House Committee Substitute for House Bill No. 10, § 10.705. Senate Substitute Amendment No. 2 would have allowed sharing of expenses, employee wages or salaries, equipment, and supplies so long as the affiliated abortion provider reimbursed the grantee. LF 1295. The Senate adopted Senate Amendment No. 2 to Senate Substitute Amendment No. 2, which left out any allowance for reimbursement of shared expenses and replaced Senator Maxwell's language in Senate Substitute Amendment No. 2 with the finally adopted language of § 10.705 (1999). LF 1296-98. By implicitly rejecting Senator Maxwell's amendment to § 10.705 (1999), the General Assembly expressed its intent that the phrase "share" in § 10.705 (1999) not be defined in the manner advocated by the Director. See L & R Distributing, Inc. v. Missouri Dept. of Revenue, 529 S.W.2d 375, 379 (Mo. 1975) (action by the legislature in rejecting amendment "clearly shows the legislature's view of its own intent").

Even if the Director's interpretation were correct and the Appropriations allowed for reimbursement between fund recipients and their affiliated abortion providers,

Planned Parenthood still failed to satisfy the Appropriations. Planned Parenthood maintains that its affiliated abortion providers reimburse it for the expense items, employees, and equipment that it provides to its affiliated abortion providers "according to generally accepted accounting practices." Planned Parenthood's Br., pp. 30-31. (The State could not verify this allegation because Planned Parenthood refused to produce its financial records as the State requested.) However, the alleged cost accounting principles that were used to allocate expenses between Planned Parenthood and its affiliated abortion service providers are only theoretical models. Planned Parenthood did not track or charge its affiliated abortion providers for their actual use of the expense items, employees, and equipment provided by Planned Parenthood. Planned Parenthood's "allocations" did not accurately reflect the expenses incurred by its affiliated abortion providers and its affiliated abortion providers did not truly and completely "reimburse" Planned Parenthood for the expense items, employee wages and salaries, and equipment that Planned Parenthood provided to them.

In sum, Planned Parenthood shared facilities, expenses, employee wages and salaries, and equipment with its affiliated abortion providers. The Circuit Court, therefore, correctly found that Planned Parenthood was ineligible under the Appropriations to receive state family planning funds.

C. The Director's Interpretation of the Appropriations Was Not Mandated by the Eighth Circuit's Decision in Planned Parenthood v. Dempsey

Planned Parenthood invokes the rule of law that ambiguous language in a statute should be construed to avoid constitutional problems and erroneously contends that the Director's interpretation of the Appropriations was mandated by the Eighth Circuit's decision in Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey, 167 F.3d 458 (8th Cir. 1999) ("Dempsey I"), concerning the state family planning appropriation for fiscal year 1999, House Bill No. 1010, § 10.715 (1998). Nothing in Dempsey I mandated the Director's misinterpretation of the plain language of the Appropriations. In that case, the court found that § 10.715 (1998) was constitutional because the statute allowed state family planning fund recipients to have "independent affiliates" that provide abortion services outside of the state family planning program so long as the "affiliation [did] not include direct referrals for abortion" and the affiliates were truly "independent," meaning that they were not directly or indirectly subsidized by a grantee. Id. at 463-64. The court stated that "[n]o subsidy will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family-planning funds." Id. at 463. The court also acknowledged "the State's valid policy decision to remove its imprimatur from abortion services and to encourage childbirth over abortion"; recognized that the State has the right to ensure "that abortion service providers will not receive benefits in the form of marketing, fixed expenses, or State

family planning funds from § 10.715 grantees"; and stated that a woman's right to an abortion "implied no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." Id. at 462-64.

Contrary to Planned Parenthood's suggestion, the Eighth Circuit did not indicate "the limits as to how far a state could go to achieve the permissible purpose of ensuring that its family planning funds do not subsidize abortion." Planned Parenthood's Br., p. 70. In Dempsey I, the court did not address the validity of the eligibility restrictions in the Appropriations at issue here. Those eligibility restrictions were not included in § 10.715 (1998) and were not at issue in Dempsey I.

Even so, the eligibility restrictions in the Appropriations at issue here are entirely consistent with Dempsey I. Planned Parenthood concedes that the Eighth Circuit held that the State can require Planned Parenthood and its affiliated abortion providers to provide their respective services in separate facilities. Planned Parenthood's Br., p. 70. The Appropriations did just that by prohibiting fund recipients from sharing facilities with their affiliated abortion providers. Because Planned Parenthood and its affiliated abortion providers "shared" (i.e., used) the same facilities, including the same buildings, Dempsey I expressly holds that the State could exclude Planned Parenthood from the family planning program.

If the State may constitutionally prohibit fund recipients from sharing facilities with their affiliated abortion providers, then surely the State may constitutionally prohibit fund recipients from sharing other necessary aspects of conducting business—business

names, expenses, employee wages and salaries, and equipment and supplies—with their affiliated abortion providers. See Rust v. Sullivan, 500 U.S. 173 (1991) (upholding regulations that required recipients of federal family planning funds under Title X to maintain an objective integrity and independence and to be physically and financially separate from prohibited abortion activities by the use of separate facilities, personnel, and accounting records); Legal Aid Soc'y of Hawaii v. Legal Services Corp., 145 F.3d 1017, 1025 (9th Cir. 1998) (upholding similar regulations). (Planned Parenthood cites no case holding such types of eligibility conditions unconstitutional.) The Eighth Circuit's overriding concern in Dempsey I was to ensure that a grantee's operations are separate and independent from its affiliated abortion provider's operations so that the State does not lend its imprimatur to abortion services and abortion providers do not receive any direct or indirect economic or marketing benefits from the grantee's receipt of state family planning funds. The eligibility restrictions in the Appropriations, as construed in accordance with their plain meaning, fulfilled that very purpose.

II. The Circuit Court Correctly Found That Planned Parenthood Directly Referred Patients to Abortion Providers, Distributed Marketing Materials About Abortion Services to Patients, and Counseled Patients to Have Abortions

Planned Parenthood challenges the Circuit Court's finding that Planned Parenthood directly referred patients to abortion providers, including its affiliated abortion providers, distributed marketing materials about abortion services to patients,

and counseled patients to have abortions. PRLF 361; A3. The undisputed evidence, however, demonstrates that the Circuit Court's finding was correct.

A. Planned Parenthood Directly Referred Patients to Abortion Providers and Assisted and Counseled Patients to Have Abortions

The Appropriations stated that "[a]n organization that receives these funds may not directly refer patients who seek abortion services to any organization that provides abortion services, including its own independent affiliate. Nondirective counseling relating to pregnancy may be provided." § 10.705.1 (1999) (PRLF 41; A9); § 10.710.1 (2000) (PRLF 46; A14). The Appropriations defined "nondirective counseling" as "providing patients with a list of health care and social service providers that provide pregnancy, prenatal, delivery, infant care, foster care, adoption, alternative to abortion and abortion services and nondirective, non-marketing information in regard to such providers." Id.

It is undisputed that Planned Parenthood directly referred patients to abortion providers. PRLF 23, 26, 62, 65; LF 1803. Rather than always providing a woman who is pregnant with "a list of health care and social service providers that provide pregnancy, prenatal, delivery, infant care, foster care, adoption, alternative to abortion and abortion services and nondirective, nonmarketing information in regard to such providers" as required by the Appropriations, Planned Parenthood sometimes provided a pregnant woman who sought an abortion with materials that directly referred her to an abortion provider. Because Planned Parenthood did not always provide a pregnant woman with information about all of her available options, it was possible that a pregnant woman

could leave a Planned Parenthood health care facility with brochures about abortion, but without brochures about adoption and parenthood. PRLF 23, 26, 62, 66; LF 357, 363, 1796, 1799, 1804, 1807.

PPSLR made direct referrals for abortion via the telephone, through its Internet website, and through its various health centers. Indeed, PPSLR's "referral line" is the telephone number for Reproductive Health's listing in the Yellow Pages under the heading "Abortion Providers." PRLF 190, 223-24, 254.

In most instances, PPSLR's abortion referrals were made to its affiliate, Reproductive Health. PPSLR's "Pregnancy Testing Protocol," which was used at PPSLR until October 11, 1999, stated that when a PPSLR patient sought an abortion, the PPSLR employee should offer her Reproductive Health first. PRLF 23, 63; LF 860; A48.

Similarly, PPKM's actions in informing a woman of the availability of abortion services go beyond the nondirective counseling permitted by the Appropriations. When answering telephone calls from women seeking information about the availability of abortion services, PPKM directly referred patients who sought abortion services to organizations that provide abortion services, including its own affiliate. LF 1002-03. PPKM required that its employees answer patients' questions regarding pregnancy options, including abortion. PRLF 26, 65. PPKM attempted to provide a woman who is pregnant with as much information as it can about her options, including abortion. PRLF 26, 65; LF 362, 1001, 1799.

PPKM also sometimes distributed to patients who are pregnant an Informed Consent Form that is required to be received 24 hours before an abortion under Kansas

state law. LF 983-84, 1000, 1269-71; A53-55. This form, printed with the name of Comprehensive Health at the top, is a direct referral to Comprehensive Health. Id. Under Kansas law, a woman who seeks an abortion must receive the informed consent form at least 24 hours prior to obtaining an abortion. By providing patients with the informed consent form, PPKM eliminated the need for the woman to make two separate trips to the abortion provider. Not only did PPKM directly refer women to Comprehensive Health, it assisted and counseled them to obtain abortions faster. To be eligible for funds under the Appropriations, Planned Parenthood could not assist with abortions as it did.

Planned Parenthood's affiliated abortion providers received an economic benefit whenever Planned Parenthood referred patients to them for abortion. They charge substantial amounts for abortions. See, e.g., LF 852-53 (charges for abortion services at Reproductive Health range from $320.00 to $1100.00). Recipients of state family planning funds subsidize abortions and benefit abortion providers when they directly refer patients for abortions. Because Planned Parenthood directly referred patients for abortion, assisted with abortions, and counseled patients to have abortions, it was ineligible to receive state family planning funds under the Appropriations.

B. Planned Parenthood Distributed Marketing Materials About Abortion Services to Patients

The Appropriations stated that a fund recipient "may not display or distribute marketing materials about abortion services to patients." Planned Parenthood distributed marketing materials about abortion to its patients. Indeed, it conceded in its responses to

the State's requests for admissions that it furnishes and makes available to patients "brochures, advertisements, pamphlets, or other information regarding abortion services …, including … services available at [its affiliated abortion providers]." LF 1133, 1152-53; A57, 59-60. Those brochures, such as "Options Counseling and Abortion Services" (which contains information on abortion services and fees at Reproductive Health) (LF 863-66; A49-52), "Coping Successfully After An Abortion" (LF 1272-79), and "Abortion Questions and Answers" (LF 868-90), actively marketed abortion. Accordingly, Planned Parenthood was ineligible under the Appropriations to receive state family planning funds.

III. The Circuit Court Erred in Concluding That the Federal Title X Program Required Planned Parenthood to Perform the Services That Constituted the Direct Referral of Patients to Abortion Providers, the Distribution of Marketing Materials About Abortion Services to Patients, and the Assistance and Counseling of Patients to Have Abortions and, Consequently, in Ruling That Planned Parenthood's Abortion Referral, Marketing, Assistance, and Counseling Activities Did Not Render Planned Parenthood Ineligible Under the Appropriations to Receive State Family Planning Funds Because the Appropriations Prohibited Such Activities and Nothing in the Federal Title X Program Required Planned Parenthood to Perform Any Activities Prohibited by the Appropriations and, in Any Event, the Title X Regulations Did Not Mandate Planned Parenthood's Abortion Referral, Marketing, Assistance, and Counseling Activities

As a defense, Planned Parenthood claimed that its abortion referral, marketing, assistance, and counseling activities did not violate the Appropriations because, it maintains, these activities are mandated by the federal Title X program. (Title X, 42 U.S.C. § 300 et seq., is the federal family planning program and states that none of the funds appropriated thereunder "shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6.) The Appropriations provided: "Nothing in this subsection requires an organization receiving federal funds pursuant to Title X of the Public Health Service Act to refrain from performing any service that must or shall be provided pursuant to Title X or the Title X Program Guidelines for Project Grants for Family Planning Services as published by the U.S. Department of Health and Human

Services as such laws and guidelines are currently in effect." § 10.705.1 (1999) (PRLF 43; A11); § 10.710.1 (2000) (PRLF 47; A15).

The Circuit Court erroneously concluded that the Title X regulations mandated Planned Parenthood's abortion referral, marketing, assistance, and counseling activities. As *Amicus Curiae* Missouri Family Health Council, Inc., the administrator of Title X funds in Missouri, explains in great detail, the federal Title X program did not require recipients of Title X funds (such as Planned Parenthood) to make direct referrals of patients to abortion providers, distribute marketing materials about abortion services to patients, or counsel patients to have abortions. This Court should reverse the Circuit Court's ruling on the Title X issue and enter judgment declaring: (a) that the federal Title X program did not mandate Planned Parenthood's abortion referral, marketing, assistance, and counseling activities; and (b) that Planned Parenthood was ineligible under the Appropriations to receive state family planning funds because it directly referred patients to abortion providers, distributed marketing materials about abortion services to patients, and assisted and counseled patients to have abortions.[7]

[7] The Court should address this issue even if it affirms the Circuit Court's ruling that Planned Parenthood was ineligible under the Appropriations to receive state family planning funds on the basis that it shared a similar name, facilities, expenses, employee wages or salaries, and equipment with its affiliated abortion providers. If the federal courts subsequently find that those restrictions were unconstitutional, Planned Parenthood will be allowed to retain the state family planning funds it improperly received under

A. Title X Did Not Require Planned Parenthood to Perform Any Activities Prohibited by the Appropriations

The United States Department of Health and Human Services has recently made clear that the Title X program requirements are not inconsistent with the restrictions found in House Bill No. 10, § 10.710 (2001), which contains the same restrictions as found in the Appropriations (except that § 10.710 (2001), unlike the Appropriations, does not contain any Title X exception). A61-63 (August 2, 2001 letter from United States Department of Health and Human Services to Missouri Family Health Council, Inc.). In turn, the Missouri Department of Health has recently noted that state family planning fund recipients "are not required to perform any services under Title X that are prohibited under the state family planning appropriation." A64 (August 8, 2001 letter from Missouri Department of Health to Missouri Family Health Council, Inc.).[8]

The Appropriations prohibited state family planning fund recipients from directly referring patients to abortion providers, distributing marketing materials about abortion

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§ 10.705 (1999) unless this Court specifically rules that Planned Parenthood was also ineligible under the Appropriations to receive state family planning funds because it directly referred patients to abortion providers, distributed marketing materials about abortion services to patients, and assisted and counseled patients to have abortions.

[8] Planned Parenthood cites these two letters in its brief and included them at the end of the appendix to its brief.

services to patients, or assisting or counseling patients to have abortions. As the recent letters from the United States Department of Health and Human Services and the Missouri Department of Health make clear, the federal Title X program has not required Title X fund recipients (such as Planned Parenthood) to engage in such activities because the Appropriations prohibited them. Accordingly, Planned Parenthood's abortion referral, marketing, assistance, and counseling activities did not come within the Appropriations' exception for activities required under the federal Title X program.

B. The Title X Regulations Did Not Mandate Planned Parenthood's Abortion Referral, Marketing, Assistance, and Counseling Activities

In any event, the Title X regulations did not mandate Planned Parenthood's abortion referral, marketing, and assistance activities. 42 C.F.R. § 59.5(a), the part of the Title X regulations at issue, provides:

> Each project supported under this part must:
>
> * * *
>
> (5) Not provide abortion [as] a method of family planning. A project must:
>
> (i) Offer pregnant women the opportunity to [be] provided information and counseling regarding each of the following options:
>
> (A) Prenatal care and delivery;
>
> (B) Infant care, foster care, or adoption; and
>
> (C) Pregnancy termination.

> (ii) If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling.

Under § 59.5(a)(5), Title X grantees must: (1) offer every pregnant woman information and counseling on all three options—parenthood, adoption, and abortion—so that she can make an "informed choice"; and (2) if the woman accepts that offer, provide information and nondirective counseling on all three options unless she affirmatively indicates that she does not with to receive information and counseling about a particular option or options.

There is no evidence that Planned Parenthood complied with § 59.5(a)(5). Specifically, there is no evidence that Planned Parenthood: (1) offered information and counseling on all three options to every pregnant woman who used its services; or (2) provided a pregnant woman with information and nondirective counseling on all three options unless the woman affirmatively indicated that she did not with to receive information and counseling about a particular option or options. Planned Parenthood admits in its brief that once a woman indicated that she may choose to have an abortion, it did not offer or provide any information or counseling on parenthood or adoption. Yet, the fact that a woman indicated that she may choose to have an abortion does not in itself

indicate that she did not want to consider her other options and did not wish to receive any information or counseling about parenthood or adoption. Her decision may have been tentative. She might have changed her mind. The purpose of the requirement in § 59(a) that a woman be offered information and nondirective counseling on all options is to ensure that she makes a fully-informed choice as to her pregnancy. Planned Parenthood failed to meet this basic and fundamental goal of the Title X program.

Planned Parenthood's failure to comply with § 59.5(a) is most apparent with PPSLR's automated telephone referral system or "referral line." Planned Parenthood admits in its answer that "[i]f a caller asks for information about obtaining an abortion, the caller will be provided a list of abortion providers, including Reproductive Health." PRLF 63. PPSLR's "referral" telephone line is the telephone number for Reproductive Health's listing in the Yellow Pages under the heading "Abortion Providers." PRLF 223-24. When this "referral line" is called, the first option on the automated menu says: "For surgical abortions or the abortion pill, counseling and tubal ligation from our affiliate, Reproductive Health Services of Planned Parenthood of the St. Louis Region, press 1." PRLF 191, 254. Although the automated menu driven system offers a quick and direct referral for an abortion, it contains no options for receiving information, counseling, or referrals for prenatal care or adoption. This violates the requirement of § 59.5(a)(5) that every pregnant woman be offered an opportunity to receive information and counseling on all three options so that she can make an "informed choice."

Moreover, nothing in the new Title X regulations required PPKM to distribute the Informed Consent Form to patients. Such actions went beyond merely providing a

patient with the name, address, and/or telephone number of an abortion provider, but constituted affirmative action by PPKM to secure abortions services for its patients at its affiliated abortion provider (Comprehensive Health). "Actions prohibited in a Title X project include … explaining and obtaining signed abortion consent forms from clients interested in abortions." Brief of *Amicus Curiae* Missouri Family Health Council, Inc., p. 16 and Appendix, pp. 42-43. As discussed above, by giving pregnant women this Informed Consent Form, not only did PPKM directly refer women to Comprehensive Health for abortion, it assisted and counseled them to obtain abortions faster by eliminating the need for the women to make two separate trips to the abortion provider (Comprehensive Health).

In sum, the Circuit Court erred in concluding that Title X mandated Planned Parenthood's abortion referral, marketing, assistance, and counseling activities. In turn, Planned Parenthood failed to satisfy the requirements in the Appropriations that it not directly refer patients to abortion providers, that it not distribute marketing materials about abortion services to patients, and that it not assist or counsel patients to have abortions. This Court should reverse the Circuit Court's finding that Title X mandated Planned Parenthood's abortion referral, marketing, assistance, and counseling activities and declare that—in addition to being ineligible under the Appropriations for state family planning funds because it shared a similar name, facilities, expenses, employee wages and salaries, and equipment with its affiliated abortion providers—Planned Parenthood was also ineligible to receive such funds because it directly referred patients to abortion

providers, distributed marketing materials about abortion services to patients, and assisted and counseled patients to have abortions.[9]

IV. The Circuit Court Correctly Ruled That Planned Parenthood Was Ineligible to Receive State Family Planning Funds and Correctly Refused to Give Planned Parenthood Additional Time to Comply with the Appropriations Because the Missouri Constitution Precluded Planned Parenthood from Receiving or Retaining Any State Family Planning Funds at Any Time During Which Planned Parenthood Was Ineligible Under the Appropriations to Receive Such Funds

Planned Parenthood contends that the Circuit Court should have given Planned Parenthood an unspecified amount of time to comply with the Circuit Court's construction of the Appropriations. This point is moot, however, because the Appropriations have expired and Planned Parenthood can no longer receive funds under those Appropriations even if it does now bring itself into compliance with their eligibility requirements.

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[9] Assuming, arguendo, that Title X did mandate Planned Parenthood's abortion referral, marketing, assistance, and counseling activities, Planned Parenthood was ineligible under the Appropriations to receive state family planning funds because it shared a similar name, facilities, expenses, employee wages and salaries, and equipment with its affiliated abortion providers. As the Circuit Court noted, Title X has no effect on those other prohibitions in the Appropriations.

Even if Planned Parenthood's point were not moot, the Circuit Court would have erred had it allowed Planned Parenthood to retain or continue receiving state family planning funds. Article IV, § 28 of the Missouri Constitution prohibits the executive branch from withdrawing or paying out money from the state treasury except in strict accordance with an appropriation. State ex inf. Danforth v. Merrell, 530 S.W.2d 209, 213 (Mo. banc 1975). It would have been unconstitutional for the Circuit Court to allow Planned Parenthood to retain or continue receiving state family planning funds for any period of time after the Circuit Court ruled that Planned Parenthood was ineligible to receive those funds.

Planned Parenthood complains that the Circuit Court gave it "no guidance as to what steps [it] could take to achieve compliance" with the Appropriations. Planned Parenthood's Br., p. 80. Yet, Planned Parenthood had no difficulty understanding what the Circuit Court's ruling requires of it when it filed its motion for preliminary injunction in the federal litigation in July 2001. Planned Parenthood acknowledged that it would have to eliminate the words "Planned Parenthood" from its name or the names of its affiliated abortion providers; that it would have to obtain separate facilities for itself and its affiliated abortion providers; and that it could not share management or other employees with its affiliated abortion providers (although it and its affiliated abortion providers could have the same board of directors). See A31-39. (Of course, Planned Parenthood would also have to stop directly referring patients to abortion providers, distributing marketing materials about abortion services to patients, and assisting and

counseling patients to have abortions.) Planned Parenthood complained about the costs that it claimed it would incur to comply with the Appropriations. Id.

Planned Parenthood also suggests that the Circuit Court should have remanded to the Director with instructions that she promulgate a new construction of the Appropriations. Planned Parenthood's Br., p. 45. However, the judiciary, not the Director, has the final say on what the Appropriations mean. See, e.g., Asbury v. Lombardi, 846 S.W.2d 196, 200 (Mo. banc 1993) ("The quintessential power of the judiciary is the power to make final determinations of questions of law."); Rivers v. Roadway Exp., Inc., 511 U.S. 298, 312 (1994) ("It is this Court's responsibility to say what a statute means …"). Having already conclusively construed the Appropriations and applied them to the facts of this case, the Circuit Court correctly declined to allow the Director a second chance to construe and apply the Appropriations in accordance with the General Assembly's intent. The Director is no longer a party in this case and Planned Parenthood has not asserted any claim against her.

The Circuit Court did not, as Planned Parenthood suggests, "change" the rules or give the Appropriations a "new" construction. Instead, the Circuit Court explained what the Appropriations meant since they were enacted and applied them to the factual situation before it concerning Planned Parenthood. "It is [the] Court's responsibility to say what a statute means . . . . A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Rivers, 511 U.S. at 312-13. "[W]hen [the] Court construes a

statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." Id. at 313 n.12.

In essence, Planned Parenthood complains that the Circuit Court's decision operates retrospectively. But that is the very nature of judicial decisionmaking. "The principle that … judicial decisions operate retrospectively is familiar to every law student." Rivers, 511 U.S. at 311-12. Judicial decisions are supposed to affect the parties to the case. In every case where the court construes a statute, there will be winners and losers. The fact that the Director misconstrued the Appropriations cannot relieve Planned Parenthood of its failure to comply with the eligibility requirements under those statutes for receiving state family planning funds.

Planned Parenthood was ineligible under each Appropriation to receive state family planning funds since the date each Appropriation took effect. The Circuit Court, therefore, did not err in immediately precluding Planned Parenthood from receiving any more such funds (or by ordering Planned Parenthood to return the funds it had already received).

The Circuit Court has never permanently precluded Planned Parenthood from becoming eligible to receive state family planning funds under the Appropriations. In its original judgment of November 16, 1999, the Circuit Court ruled that Planned Parenthood failed to satisfy the eligibility requirements of § 10.705 (1999) and precluded Planned Parenthood "from applying for or obtaining state family planning funds unless and until they are in full compliance with the requirements set forth in H.B. 10 § 10.705

(1999)." LF 2118. The Circuit Court reaffirmed that ruling with respect to both Appropriations on May 30, 2001.

Planned Parenthood has made no effort whatsoever to bring itself into compliance with the eligibility requirements of the Appropriations since the Circuit Court's first judgment over two years ago or even since the Circuit Court's second judgment over six months ago. Instead, Planned Parenthood has chosen to take its chances with its appeal to this Court, and if unsuccessful, with its federal constitutional challenge to the Appropriations in the federal litigation. Having chosen that path, Planned Parenthood can hardly fault the Circuit Court for not giving it additional time to receive state family planning funds while it remained out of compliance with the Appropriations.

V. The Circuit Court Correctly Required Planned Parenthood to Return to the State the Family Planning Funds That Planned Parenthood Received Under § 10.705 (1999) Because It Is Not Inequitable to Require Planned Parenthood to Return the State Family Planning Funds It Improperly Received in That Planned Parenthood Was Ineligible to Receive Those Funds, Planned Parenthood Represented to the Circuit Court That It Would Return Any Funds If the Circuit Court Ultimately Determined That Planned Parenthood Was Not Eligible to Receive Those Funds, the State Is Not Estopped to Recover Those Funds, and It Would Violate the Missouri Constitution to Allow Planned Parenthood to Retain Those Funds

Planned Parenthood received state family planning funds under § 10.705 (1999) even though it violated almost every eligibility condition in that statute. Without citing any authority or any specific legal theory, Planned Parenthood claims that "there is no legal authority, and it is inequitable, to order the funds be repaid" to the State because, it maintains, it was in compliance with its contract with the Department and the Director had the authority to enter into the contract. Planned Parenthood's Br., p. 82. To the contrary, there is ample authority for the Circuit Court's repayment order. It would have been inequitable and contrary to law if the Circuit Court had allowed Planned Parenthood to keep those funds. Planned Parenthood was not in compliance with the eligibility requirements of § 10.705 (1999). This Court should reject Planned Parenthood's defense that it relied on the Director's actions because the Director had no authority to enter into contracts or distribute funds to Planned Parenthood in violation of § 10.705 (1999).

Planned Parenthood acknowledged its liability to repay any state family planning funds if the Circuit Court ultimately determined that Planned Parenthood was not eligible to receive those funds. In opposing the State's motion for a temporary restraining order at the outset of this action, Planned Parenthood represented to the Circuit Court:

> There is nothing more basic in law than the proposition that there is neither irreparable injury nor lack of an adequate remedy at law when the only harm would be the payment of money, which clearly can be recovered if, in fact, the plaintiff succeeds on the merits of its claims. LF 41.

> [I]f plaintiff were to prevail, it would have a legal remedy that would allow it to recover any funds that, arguendo, were paid wrongfully. LF 45.

> In light of the absence of any irreparable harm as a result of the payment of funds to Planned Parenthood during the pendency of this action, and the availability of an entirely adequate remedy at law if, in fact, the plaintiff ultimately prevails and this Court orders the repayment of that money, no hearing—certainly no emergency hearing—on the motion for a temporary restraining order is needed. LF 51.

The Circuit Court denied the State's motion, presumably based on Planned Parenthood's representations. LF 1250. Given those representations, it would be inequitable to allow Planned Parenthood to keep the state family planning funds it wrongfully received.[10]

Citing Aetna Ins. Co. v. O'Malley, 124 S.W.2d 1164, 1165-66 (Mo. 1938), Planned Parenthood acknowledges that "[t]his Court has consistently held that persons entering into contracts with agents of the state are charged with knowledge of the authority of the agent, and whether the contract is within the agent's authority." Planned Parenthood's Br., p. 82. In Aetna Ins. Co., the superintendent of insurance, a state officer, hired attorneys to institute restitution proceedings as a result of a reduction in certain state insurance rates. When the attorneys later sought to recover their fees under various theories, this Court addressed the issue of whether the superintendent of insurance had the authority to employ the attorneys and, if not, whether the attorneys were entitled to recover their fees on equitable grounds. In denying the attorneys' claims, this Court stated:

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[10] Planned Parenthood has been on notice from the beginning that, notwithstanding the Director's contracts, the State believed that Planned Parenthood was not eligible under § 10.705 (1999) to receive state family planning funds. Why else would Planned Parenthood have brought the federal litigation against the Director before § 10.705 (1999) even took effect given that the Director intended to distribute funds to Planned Parenthood?

> All persons dealing with such officers are charged with knowledge of the extent of their authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. Such power must be exercised in manner and form as directed by the Legislature.
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> * * *
>
> The doctrine of estoppel, when invoked against the state has only a limited application, even when an unauthorized contract on its behalf has been performed, and thereby the state has received a benefit, and so it is held that a state cannot by estoppel become bound by the unauthorized contracts of its officers; nor is a state bound by an implied contract made by a state officer where such officer had no authority to make an express one.

Id. at 1166-67 (citations omitted); see also State ex rel. Johnson v. Leggett, 359 S.W.2d 790, 799 (Mo. 1962) (finding a contract with the state invalid and denying recovery "under any theory of estoppel or otherwise").

Planned Parenthood is correct that the Director has the authority to enter into contracts for the provision of family planning services. But the Director lacked the authority to enter into contracts, such as her contracts with Planned Parenthood, that ran afoul of § 10.705 (1999).

Under Aetna Ins. Co., Planned Parenthood is charged with knowledge that the Director's contracts with it exceeded her authority and were outside of the power conferred upon her by § 10.705 (1999). Because the Director acted in excess of her

authority in issuing contracts to Planned Parenthood, Planned Parenthood is not entitled to keep the funds it wrongfully received.

Planned Parenthood protests that it should not have to return any funds because the Director misconstrued § 10.705 (1999). Presumably, Planned Parenthood seeks to invoke estoppel. However, "[i]t is well-established [] that estoppel does not lie against governmental entities absent exceptional circumstances." City of Washington v. Warren County, 899 S.W.2d 863, 867 (Mo. banc 1995); Missouri Gas Energy v. Public Service Comm'n, 978 S.W.2d 434, 438 (Mo. App. 1998). Missouri courts have rarely, if ever, applied estoppel against the State.

Specifically, Missouri courts have refused to apply estoppel when a governmental agency erroneously interprets a statute. See Contel of Missouri, Inc. v. Director of Revenue, 863 S.W.2d 928, 930-31 (Mo. App. 1993) (Director of Revenue not estopped to assess taxes retrospectively although he previously interpreted statute as exempting plaintiffs from the taxes). An agency's failure to enforce a statute "does not amount to misconduct of the kind required to raise an estoppel." Farmers' and Laborers Co-op Ins. Ass'n v. Director of Revenue, 742 S.W.2d 141, 144 (Mo. banc 1987).

Allowing Planned Parenthood to retain the funds it received under § 10.705 (1999) would violate the Missouri Constitution. Such a ruling would permit state funds to be appropriated in a manner contrary to their stated purpose in violation of Article IV, § 28. It would also run afoul of Article III, § 39(4) of the Missouri Constitution, which states that "[t]he general assembly shall not have power: … (4) To pay or to authorize the payment of any claim against the state or any county or municipal corporation of the state

under any agreement or contract made without express authority or law." Because the contracts that the Director issued to Planned Parenthood were without legal authorization, the State was not constitutionally permitted to make payments to Planned Parenthood. This Court should affirm the Circuit Court's order that Planned Parenthood return to the State the family planning funds it unlawfully received under § 10.705 (1999).

VI. The Circuit Court Correctly Concluded That the State Has the Authority to Pursue Against Planned Parenthood the Claims in the Second Amended Petition Because the Missouri Attorney General Has Specifically Authorized the Special Assistant Attorney General to Pursue These Claims on Behalf of the State, the Second Amended Petition Does Not Assert Any Claim or Seek Any Relief Against the Director, and Planned Parenthood's Reliance on the Director's Construction of the Appropriations Is a Defense to the State's Claims Against Planned Parenthood, Not a Claim for Relief by the State Against the Director

In its decision in the previous appeal, this Court held that the Missouri Attorney General's appointment letters define the scope of the SAAG's authority in this litigation and the federal litigation. See State v. Planned Parenthood of Kansas and Mid-Missouri, 37 S.W.3d 222, 226-27 (Mo. banc 2001). In his letter of March 9, 2001, the Missouri Attorney General specifically authorized the SAAG to pursue against Planned Parenthood the claims in the State's Second Amended Petition. PRLF 53-54; A21-22. Yet, Planned Parenthood challenges the Circuit Court's ruling that the State has the authority to pursue the claims in its Second Amended Petition. Planned Parenthood

asserts that because the Director construed the terms "similar name" and "share" in the Appropriations favorably to Planned Parenthood and otherwise determined that Planned Parenthood was eligible to receive state family planning funds, the State's claims against Planned Parenthood are "implicitly" claims against the Director. Planned Parenthood argues that the State cannot maintain these "implicit" claims against the Director because the Missouri Attorney General has no longer authorized the State to pursue any claims against the Director.

Planned Parenthood's argument fails because the Second Amended Petition does not assert any claim or seek any relief against the Director. (Indeed, the Director is no longer even a party in this case.) Instead, the Second Amended Petition only asserts claims and seeks relief against Planned Parenthood challenging Planned Parenthood's eligibility to receive state family planning funds under the Appropriations. The Missouri Attorney General has specifically authorized the SAAG to pursue these claims on behalf of the State. PRLF 53-54; A21-22.

Planned Parenthood's reliance on the Director's construction of terms in the Appropriations is a partial (meritless) defense to the State's claims against Planned Parenthood. For its third affirmative defense to the Second Amended Petition, Planned Parenthood asserts: "The Director, acting within her authority, has construed the terms of the appropriation. The Director has correctly determined that PPKM and PPSLR are eligible for the family planning program under her construction of the appropriations." PRLF 69.

The fact that the State challenges the legal merits of Planned Parenthood's reliance-on-the-Director defense does not convert that defense into an affirmative claim for relief by the State against the Director. The State claims that Planned Parenthood failed to satisfy the eligibility requirements of the Appropriations and, consequently, could not receive state family planning funds. The State's right to enforce those eligibility requirements against Planned Parenthood is independent of how the Director chose to construe or enforce them (or not enforce them). The Director cannot prejudice the State's right to ensure that state family planning funds are spent in strict accordance with the terms and conditions of the Appropriations.

To the extent that any of the claims of the Second Amended Petition potentially impact the Director, the Missouri Attorney General has authorized the State to pursue them. The Missouri Attorney General's new appointment letter of February 26, 2001 withdrew the SAAG's authority to pursue any claims on behalf of the State against the Director (while acknowledging that the SAAG had acted within the authority of his previous engagement in pursuing the State's now dismissed claims against the Director). However, the Missouri Attorney General's subsequent letter of March 9, 2001 amended his appointment letter of February 26, 2001 and authorized the SAAG to pursue the very claims asserted in the Second Amended Petition. PRLF 53-54; A21-22. The March 9, 2001 letter concludes: "To the extent that the terms of our February 26, 2001 [letter] did not authorize you to take the actions listed above [the filing of claims in the Second Amended Petition], the terms of your appointment are hereby amended to allow you to pursue those actions." PRLF 54; A22.

During the previous proceedings leading up to the first appeal before this Court, the State asserted that Planned Parenthood was ineligible under § 10.705 (1999) to receive state family planning funds because Planned Parenthood directly referred patients to abortion providers, distributed marketing materials about abortion services to patients, assisted with abortions, and shared a similar name, facilities, expenses, employee wages and salaries, and equipment with its affiliated abortion providers. When the Missouri Attorney General authorized the State to pursue claims against Planned Parenthood challenging Planned Parenthood's eligibility to receive state family planning funds, he expected that the State would assert the same bases for challenging Planned Parenthood's eligibility to receive state family planning funds as the State asserted before. Thus, the Missouri Attorney General has authorized the SAAG to pursue, on behalf of the State, Planned Parenthood's eligibility under the Appropriations to receive state family planning funds, regardless of whether the State's claims impact the Director as well as Planned Parenthood.

Planned Parenthood's challenge to the State's authority to pursue the claims in its Second Amended Petition is simply a ruse to distract the Court from Planned Parenthood's undisputed failure to comply with the eligibility requirements of the Appropriations. This Court should affirm the Circuit Court's ruling that the State has the authority to pursue against Planned Parenthood the claims in the Second Amended Petition.

VII. The Circuit Court Correctly Concluded That the First and Second Claims in the Second Amended Petition Are Justiciable Because This Case Presents A Justiciable Controversy in That the Second Amended Petition Asserts Claims Only Against Planned Parenthood and Not Against the Director, the Missouri Attorney General Has the Power to Sue Private Entities on Behalf of the State to Prevent Them from Unlawfully Receiving State Funds, and the Attorney General Properly Appointed the Special Assistant Attorney General, Who Is Accountable to the Attorney General, to Exercise That Power

Planned Parenthood argues that the Circuit Court erred in concluding that this case is justiciable. Planned Parenthood asserts that this case is not justiciable because, it maintains, the State is impermissibly asserting claims against the Director to prevent her unlawful expenditure of state funds. This Court should reject Planned Parenthood's argument and affirm the Circuit Court's ruling that this case is justiciable.

A. This Case Is Justiciable Because the Second Amended Petition Asserts Claims Only Against Planned Parenthood and Not Against the Director and the Missouri Attorney General Has the Power to Sue Private Entities on Behalf of the State to Prevent Them from Unlawfully Receiving State Funds

Planned Parenthood's justiciability argument rests on a faulty premise—that the State has sued the Director. The Second Amended Petition, however, contains no claims against the Director. It only asserts claims against Planned Parenthood. The State dismissed its claims against the Director without prejudice. PRLF 7-8. Planned

Parenthood does not dispute the power of the Attorney General's Office to pursue claims against it to prevent it from receiving or retaining state funds illegally. Accordingly, this case is justiciable.

Although Article IV, § 12 of the Missouri Constitution establishes the office of the Attorney General, "[t]he attorney general of Missouri is the only constitutional officer whose powers and duties are not specifically provided for or limited by the constitution." State ex rel. Nixon v. American Tobacco Co., Inc., 34 S.W.3d 122, 136 (Mo. banc 2000). Section 27.060, RSMo, provides:

> The attorney general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved.

"[I]t is the role of the attorney general to protect the public interest." American Tobacco Co., 34 S.W.3d at 135. "[T]he attorney general is charged with the duty to enforce the rights of the state. It is for the attorney general to decide where and how to litigate issues involving public rights and duties and to prevent injury to the public welfare." State ex rel. Igoe v. Bradford, 611 S.W.2d 343, 347 (Mo. App. 1980).

Additionally, the Attorney General "has all of the powers of the attorney general at common law" except for any powers that a statute expressly forbids him to exercise.

American Tobacco Co., 34 S.W.3d at 136. See also State ex rel. McKittrick v. Missouri Public Service Comm'n, 175 S.W.2d 857, 861 (Mo. banc 1943); State ex rel. Barrett v. Boeckeler Lumber Co., 257 S.W. 453, 456 (Mo. banc 1924). "[T]he Attorney General of this State has the common law duty to prosecute all actions necessary for the protection and defense of the sovereign people of [this State]." Martin v. Thornburg, 359 S.E.2d 472, 479 (N.C. 1987).

The Missouri Attorney General has the power to sue private entities (such as Planned Parenthood) on behalf of the State to enforce state law. See, e.g., State ex rel. Delmar Jockey Club v. Zachritz, 65 S.W. 999 (Mo. banc 1901) (attorney general had power to maintain suit against private jockey club on behalf of state to restrain private jockey club from accepting bets under licenses allegedly issued without authority by the state auditor); State ex rel. Attorney General v. Canty, 105 S.W. 1078 (Mo. 1907) (attorney general could bring suit against private parties on behalf of the state to enjoin a bullfight as a public nuisance). In particular, the Missouri Attorney General has standing under his common law powers to sue a private entity on behalf of the State to prevent the private entity from receiving or retaining state funds under its contract with a state agency when the private entity is not entitled to receive or retain those state funds, even if the state agency does not affirmatively authorize the suit. See People ex rel. Hartigan v. E & E Hauling, Inc., 607 N.E.2d 165, 169-171 (Ill. 1992) (Illinois Attorney General had standing to sue public contractors based on their misrepresentations as to compliance with minority business enterprise requirements and illegal dumping of material removed

from construction site). This is because "[t]he Attorney General has the common law duty to protect the public purse as a matter of general welfare." Id. at 170.

The public interest requires that private entities (such as Planned Parenthood) not be allowed to receive or retain state funds illegally. Article IV, § 28 of the Missouri Constitution prohibits the payment of state money to anyone except in strict accordance with an appropriation. State ex inf. Danforth v. Merrell, 530 S.W.2d 209, 213 (Mo. banc 1975). Additionally, Article III, § 39(4) of the Missouri Constitution states: "The general assembly shall not have power: … (4) To pay or to authorize the payment of any claim against the state or any county or municipal corporation of the state under any agreement or contract made without express authority or law." Accordingly, the State has the right to ensure that Planned Parenthood does not receive state family planning funds in violation of the Appropriations and the Attorney General has the power and duty under § 27.060 and the common law to enforce that right.

During the previous appeal in this case, this Court asked the parties to address "[w]hether there is a justiciable case or controversy in an action for declaratory and injunctive relief brought by the state of Missouri, represented by the attorney general through a special assistant attorney general, against the state's director of health, in her official capacity and also represented by the attorney general." This Court did not question whether there was a justiciable case between the State and Planned Parenthood and no one ever argued that the State's claims against Planned Parenthood are non-justiciable. In its decision, this Court implicitly held that the State's claims against Planned Parenthood are justiciable. If those claims were not justiciable, this Court would

have dismissed those claims instead of remanding them to the Circuit Court. This Court, therefore, should hold that the claims of the Second Amended Petition are justiciable.

B. The Attorney General Properly Appointed the Special Assistant Attorney General, Who Is Accountable to the Attorney General

Planned Parenthood contends that only the Attorney General can represent the State in this case and that the State cannot be represented by the SAAG because the SAAG is purportedly not accountable to the Attorney General. There is no merit to Planned Parenthood's contention.

The Attorney General has common law rights to appoint special assistant attorneys general to represent the State for specific limited purposes or for an individual or single case. Thatcher v. City of St. Louis, 122 S.W.2d 915, 917 (Mo. 1938). Additionally, RSMo § 27.020.1 authorizes the Attorney General "to appoint such assistant attorneys general as may be necessary to properly perform the duties of his office . . ." Thus, the Attorney General could appoint the SAAG to represent the State in this litigation.

The SAAG is accountable to the Attorney General. In his appointment letter of February 26, 2001, the Attorney General stated: "In performing your services pursuant to this appointment, you will consult with and follow the direction of the Attorney General. We have never delegated, and do not now delegate, direction or control in this matter to any other person or entity." PRLF 50.[11] Even beyond this statement, the SAAG is

[11] During the previous appeal, the SAAG stated that he controlled the litigation on behalf of the State except that the Attorney General could fire the SAAG at will. The Attorney

ultimately accountable to the Attorney General as the Attorney General can fire the SAAG at will at any time.[12] Thus, contrary to Planned Parenthood's contention, the

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General chose to represent the Director, who was then a party in this case. Under these unique circumstances, the Attorney General gave the SAAG control of the litigation on behalf of the State, subject to the SAAG's appointment being terminated in the discretion of the Attorney General, which never occurred. Since this Court's decision in the previous appeal, the Director has been dropped as a party and the Attorney General has changed the scope of the SAAG's appointment and made clear in his most recent appointment letters that he retains control of the litigation on behalf of the State. PRLF 50; A18.

[12] Assuming, arguendo, that the SAAG had control of this litigation independent of the Attorney General's direction, the Attorney General's appointment of the SAAG would still be constitutional because of the Attorney General's unrestricted power to fire the SAAG at will at any time. See United States v. Nixon, 418 U.S. 683, 694-96 (1974) (appointment of special prosecutor independent of any interference by United States Attorney General was permissible where attorney general could revoke regulation authorizing appointment of special prosecutor at any time); Morrison v. Olson, 487 U.S. 654, 685-96 (1988) (federal statute providing for the appointment of independent counsel to investigate and, if appropriate, prosecute certain high-ranking government officials for violations of federal law comported with the United States Constitution even though

positions advocated by the SAAG in this litigation are controlled by and authorized by the Attorney General.

Planned Parenthood's statement that the SAAG has been "admonished" or has overstepped the limits of his appointment by previously asserting claims against the Director is blatantly false. In his previous appointment letter of July 29, 1999, the Attorney General ratified the SAAG's actions on behalf of the State in the federal litigation. LF 560. In his appointment letter of February 26, 2001, the Attorney General acknowledged that the SAAG had acted within the authority of his engagement in pursuing the State's (now dismissed) claims against the Director. PRLF 51; A19. Moreover, the Attorney General has specifically authorized the SAAG to pursue against Planned Parenthood the claims in the State's Second Amended Petition and to assert on behalf of the State the positions that the SAAG has advocated. PRLF 53-54; A21-22. Planned Parenthood's unfounded personal attacks on the SAAG demonstrate just how weak its position is.

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statute allowed United States Attorney General to remove the independent counsel only for good cause).

C. Assuming, Arguendo, That the Second Amended Petition Asserts Claims Against the Director, This Case Is Still Justiciable Because the Missouri Attorney General Has the Power to Sue State Agencies and Officials on Behalf of the State to Prevent Them from Expending State Funds Unlawfully

Assuming, arguendo, that the Second Amended Petition asserts claims against the Director, this case is still justiciable because the Missouri Attorney General has the power to sue state agencies and officials on behalf of the State to prevent them from expending state funds unlawfully. To the extent that this Court finds any merit to Planned Parenthood's claim that the State is still asserting claims against the Director, the State respectfully refers the Court to its brief in the previous appeal and, in the interest of brevity, will summarize the argument therein.

The Missouri Attorney General has statutory and common law powers to protect the public interest and enforce the rights of the state. RSMo § 27.060; American Tobacco Co., 34 S.W.3d at 135-36; Igoe, 611 S.W.2d at 347. This Court has long upheld the right of the State, through its public officers such as the Attorney General and the county prosecuting attorneys, to sue public officials to restrain them from doing acts in violation of the constitution and laws of Missouri. See State ex rel. Taylor v. Wade, 231 S.W.2d 179, 182 (Mo. banc 1950) (Attorney General had the right to bring a mandamus action to compel the members of the County Court of Ozark County to comply with Missouri statutes and prepare and publish a financial statement for the county); State ex inf. McKittrick v. Murphy, 148 S.W.2d 527 (Mo. banc 1941) (Attorney General could

bring a quo warranto proceeding against the Unemployment Compensation Commission—"a subordinate branch of the executive department of the state government"—and its members to preclude them from unlawfully moving the commission's headquarters outside of Jefferson City); State ex rel. Circuit Attorney v. Saline County Court, 51 Mo. 350, 362-71 (1873) (circuit attorney could bring injunction action on behalf of state to restrain county court from issuing bonds pursuant to illegal subscription and to restrain officers from levying or collecting taxes to pay such bonds). The Attorney General is not limited to proceeding by way of mandamus or quo warranto, but may seek declaratory and injunctive relief. See State, to Use of Consol. Sch. Dist. No. 42 of Scott County v. Powell, 221 S.W.2d 508 (Mo. 1949) (allowing county prosecuting attorney to bring suit on behalf of the State against school district officials to recover funds that were illegally expended and noting that "[u]sually the county attorney asserts the interest of the state by bringing injunction proceedings to prevent illegal action or by quo warranto to challenge the right of officials to do the act he complains of"); Saline County Court, 51 Mo. at 362-71; People ex rel. Scott v. Illinois Racing Bd., 301 N.E.2d 285, 287-89 (Ill. 1973) (attorney general could seek declaratory judgment and injunction as to state racing board's unlawful actions).[13]

The Appropriations impose duties on the Director, a public officer, to expend funds in strict accordance with those statutes. Such duties are of a public nature—they

[13] In the present case, declaratory relief and injunctive relief are especially proper remedies because Planned Parenthood is not subject to quo warranto or mandamus.

ensure that the public's money is expended in accordance with the public's direction (as expressed through their elected representatives). Thus, the people of Missouri are the real party in interest in this case. Under the statutory and common law powers of his office, the Attorney General or his delegate (in this case, the SAAG) is a proper party to bring an action for the State to seek enforcement of the Director's duties to adhere to the Appropriations and prevent injury to the people of Missouri.[14]

The right of the Attorney General to prevent state officials from illegally expending state funds finds support in the jurisprudence of taxpayer standing. Missouri courts have long recognized the right of taxpayers to bring an action to enjoin the illegal expenditure of public funds, even against state officials. American Tobacco Co., 34 S.W.3d 122, 131-34 (Mo. banc 2000); Eastern Missouri Laborers Dist. Council v. St. Louis County, 781 S.W.2d 43, 46 (Mo. banc 1989). The standing of a taxpayer to sue is

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[14] Planned Parenthood cites a number of Missouri and federal cases generally holding that individual citizens do not have standing to complain that the federal government is violating the law. See Ours v. City of Rolla, 965 S.W.2d 343, 344 (Mo. App. 1998); Missouri Growth Ass'n v. Metropolitan St. Louis Sewer Dist., 941 S.W.2d 615, 622 (Mo. App. 1997); Arizonans for Official English v. Arizona, 520 U.S. 43 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Allen v. Wright, 468 U.S. 737, 753-55 (1984); United States v. Richardson, 418 U.S. 166 (1974). None of those cases addressed the standing of a public official charged with enforcing the law (such as the Missouri Attorney General).

not to enable a private redress, but to benefit the public. Missourians for Separation of Church and State v. Robertson, 592 S.W.2d 825, 839 (Mo. App. 1979). Because a taxpayer would have standing to challenge the Director's illegal distribution of funds to Planned Parenthood, then surely the actual Attorney General—the elected constitutional state official charged with protecting "the rights and interests of the state," § 27.060, and having "the duty to enforce the rights of the state," Igoe, 611 S.W.2d at 347—also has standing to do so. The State is not precluded from preventing unlawful actions by public officials merely because a taxpayer could sue to enjoin those unlawful actions. Saline County Court, 51 Mo. at 368.

Allowing the Attorney General to sue state officials to enjoin illegal expenditures of public funds does not erode separation of powers or encroach upon the Governor's duty to execute the laws faithfully. Such considerations have not precluded taxpayer suits and should not carry any weight in the present case.

Separation of powers is not an issue because there is no inter-branch dispute. "The separation of powers clause proscribes the exercise of powers or duties constitutionally assigned to one department by either of the other two." Dabin v. Director of Revenue, 9 S.W.3d 610, 613 (Mo. banc 2000) (quotation omitted). In the present case, the Attorney General, who is part of the executive branch, see MO. CONST. art. IV, § 12, is not assuming or interfering with a power constitutionally assigned to the legislative or judicial branches. To the contrary, he is seeking to perform his constitutional duty to protect the public interest and the rights of the State. The cases cited by Planned Parenthood involved improper attempts by the Missouri legislature, not the Attorney

General, to interfere with the constitutional powers of the executive department (of which the Attorney General is a member). See Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125, 132-34 (Mo. banc 1997) (legislative veto power over state agency rules violated separation of powers); State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228, 231 (Mo. banc 1997) (legislature could not conduct management audit of State Auditor's Office).

Moreover, the Governor's duty to execute the laws faithfully is not hampered by allowing the Attorney General to fulfill his constitutional role of ensuring that executive branch officials adhere to the law. Indeed, the Attorney General is not subject to direction from the Governor or his appointees in representing the State's interests. Igoe, 611 S.W.2d at 347 (Attorney General could appeal adverse decision against Commissioner of the Office of Administration even though Commissioner directed Attorney General not to appeal). The Attorney General ensures that public officials and private parties comply with state law; he does not administer state programs (such as the state family planning program) established under state law (such as the Appropriations).

Other jurisdictions have confirmed the right of state attorneys general to seek to enjoin state officials from spending state funds unlawfully. See Dickinson v. Hot Mixed Bituminous Industry of Ohio, 58 N.E.2d 78, 86 (Ohio App. 1943); State ex rel. Brocklyn v. Savidge, 249 P. 996, 998 (Wash. 1926) (noting that attorney general is proper party to enjoin misapplication of funds appropriated by legislature); Ariz. Rev. Stat. § 35-212(A); N.C. Gen. Stat. § 143-32. Courts in other jurisdictions have allowed the attorney general to challenge other types of unlawful action by state agencies and officials, even when the

attorney general has served as legal counsel for the state agencies or officials whose actions are challenged. See Superintendent of Ins. v. Atty. Gen., 588 A.2d 1197, 1204 (Me. 1989); State v. Mississippi Public Service Comm'n, 418 So.2d 779, 783 (Miss. 1982); Providence Gas Co. v. Burke, 419 A.2d 263, 269-71 (R.I. 1980); People ex rel. Scott v. Illinois Racing Bd., 301 N.E.2d 285, 287-89 (Ill. 1973); Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865 (Ky. 1974); State ex rel. Meyer v. Peters, 199 N.W.2d 738, 739-41 (Neb. 1972); State v. Public Service Comm'n, 283 P.2d 594 (Mont. 1955); Petition of Public Service Coordinated Transport, 74 A.2d 580, 585-86 (N.J. 1950).[15] This Court should hold the same in the present case assuming, arguendo, that it accepts Planned Parenthood's assertion that the State's Second Amended Petition asserts claims against the Director.

[15] Planned Parenthood claims that many courts "have concluded that where the attorney general has provided relevant counsel or representation, or where he is under a duty to do so, he may not commence, or intervene in, litigation as an adversary to the agency." Planned Parenthood's Br., p. 53 n.12. The cited by Planned Parenthood, such as City of York v. Penn. Pub. Utility Comm'n, 295 A.2d 825 (Pa. 1972), represent the "minority view." See Mississippi Public Comm'n, 418 So.2d at 783-84; Superintendent of Ins., 558 A.2d at 1203 ("The majority of courts confronting similar issues have recognized the unique status of the Attorney General.").

VIII. The Circuit Court Correctly Ruled that the Appropriations Did Not Violate Article III, § 23 of the Missouri Constitution Because the Appropriations Did Not Include Legislation of a General Character, Did Not Conflict with or Amend Any General Statute, and Comported with the Requirement in Article IV, § 23 of the Missouri Constitution That an Appropriation Bill Specify the Purpose of the Appropriation

Planned Parenthood contends that the Circuit Court erred in ruling that the Appropriations do not violate Article III, § 23 of the Missouri Constitution. Planned Parenthood claims in its point relied on that the Appropriations "contain substantive legislation in that they change existing law and create new regulations governing the activities (not funded by the Appropriations) of entities receiving the funds appropriated." The Appropriations, however, did not include legislation of a general character and did not amend or conflict with any general statute. Consequently, they did not violate Article III, § 23.

A. The Appropriations Are Presumed to Have Been Constitutional

The following rules constrain a court's review of a claim that legislation violates Article III, § 23:

> An act of the legislature carries a strong presumption of constitutionality. This Court resolves all doubts in favor of the procedural and substantive validity of legislative acts. Attacks against legislative action founded on constitutionally imposed procedural limitations are not favored. An act of the legislature must clearly and undoubtedly violate a constitutional

procedural limitation before this Court will hold it unconstitutional.

Finally, we will attempt to avoid an interpretation of the Constitution that will limit or cripple legislative enactments any further than what was necessary by the absolute requirements of the law.

Carmack v. Director, Missouri Dept. of Agriculture, 945 S.W.2d 956, 959 (Mo. banc 1997). The Appropriations, therefore, are presumed to have been constitutional.

B. Article III, § 23

Article III, § 23 of the Missouri Constitution provides: "No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriations bills, which may embrace the various subject and accounts for which moneys are appropriated." In Rolla 31 Sch. Dist. v. State, 837 S.W.2d 1, 4 (Mo. banc 1992), this Court noted that Article III, § 23 "provides that no bill shall contain more than one subject and limits appropriation bills to appropriations only." An appropriations bill cannot amend a general statute or otherwise include legislation of a general character. Id.; State ex rel. Gaines v. Canada, 113 S.W.2d 783, 790 (Mo. banc 1937), rev'd on other grounds, 305 U.S. 337 (1938); State ex rel. Davis v. Smith, 75 S.W.2d 828, 830 (Mo. banc 1934).

C. The Eligibility Conditions in the Appropriations Were Constitutional Restrictions Specifying the Purpose of the Appropriations

The "sole purpose" of an appropriation bill "is to set aside moneys for specified purposes." Hueller v. Thompson, 289 S.W. 338, 341 (Mo. banc 1926). The sole purpose of the Appropriations was to set aside moneys for the specified purpose of providing

family planning services, pregnancy testing, and follow-up services during the State's fiscal years 2000 and 2001, excluding any direct or indirect subsidization of abortion services or administrative expenses. The conditions in the Appropriations elaborated the Appropriations' specified purpose, clarified what constitutes an unlawful direct or indirect subsidy of abortion services or administrative expenses, and, thus, ensured that the appropriated funds were not spent contrary to the General Assembly's purpose in making the Appropriations. The General Assembly cannot be faulted for having specified the purpose of the Appropriations in sufficient detail to ensure that the State's funds were not spent contrary to the General Assembly's intent. In Dempsey I, the Eighth Circuit stated that the predecessor state family planning appropriation (for fiscal year 1999) was "facially ambiguous." 167 F.3d at 463. Moreover, Planned Parenthood criticizes the General Assembly for not defining certain terms in the Appropriations.

The eligibility conditions in the Appropriations were entirely consistent with the other constitutional restrictions on appropriations, including Article III, § 36 and Article IV, §§ 23 and 28 of the Missouri Constitution. This Court has explained the effect of these constitutional provisions:

> These sections of the constitution are unambiguous. They require no construction. Their meaning is clear: money may not be withdrawn from the state treasury for any purpose other than that specified in an appropriation law. Any appropriation law which fails to specify distinctly the purpose of an appropriation would violate § 23, supra. Any law which permits the withdrawal of state money for any purpose other than that

> specified in an appropriation law would violate § 36, supra. Any certification by the Commissioner authorizing the incurring of an obligation and the payment of state money for any purpose other than that specified in an appropriation law would violate § 28, supra. Any withdrawal of money from the state treasury by a warrant drawn for a purpose other than that specified in an appropriation law would also violate § 28, supra.

State ex inf. Danforth v. Merrell, 530 S.W.2d 209, 213 (Mo. banc 1975). Here, as required under Article IV, § 23, the General Assembly set forth the purpose of the funds appropriated in the Appropriations. Every part of the Appropriations consisted of conditions on the expenditure of the appropriated funds. The General Assembly's compliance with Article IV, § 23 cannot run afoul of Article III, § 23.

Planned Parenthood asserts that the Appropriations "essentially create the rules and regulations by which the family planning program must operate …" Planned Parenthood's Br., p. 64. While the General Assembly could create a family planning program in a general statute, nothing precludes the General Assembly from including in appropriation bills conditions and restrictions on the expenditure of funds appropriated for the purpose of providing family planning services through the Department of Health.

D. The Appropriations Did Not Amend Section 188.205

Section 188.205, RSMo, provides: "It is unlawful for any public funds to be expended for the purpose of performing or assisting an abortion, not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." Planned Parenthood erroneously argues that the

Appropriations amended RSMo § 188.205 because: (1) § 188.205 purportedly "focuses only on limiting the uses to which public funds are put" while the Appropriations imposed restrictions on the relationship between a family planning funds recipient and its affiliated abortion provider; and (2) the Appropriations, unlike § 188.205, did not allow public funds to be expended for abortions necessary to save a mother's life.

The fault with Planned Parenthood's argument is that the Appropriations applied only to the funds appropriated therein while § 188.205 applies to all public funds. The Appropriations provided: "None of these funds may be paid or granted to an organization or an affiliate of an organization that provides abortion services. . . ." (emphasis added). Section 188.205 provides: "It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion, not necessary to save the life of the mother . . ." (emphasis added).

The Appropriations did not restrict the expenditure of public funds in general. They did not apply to any public funds except those appropriated therein. For example, the Appropriations did not prohibit the use of non-family planning public funds to perform an abortion necessary to save a mother's life.

In contrast, § 188.205 does restrict the expenditure of public funds in general, including any public funds not appropriated by the Appropriations. Section § 188.205, not the Appropriations, prohibited the use of non-family planning public funds to perform an abortion not necessary to save a mother's life.

Section 188.205 does not appropriate any funds, does not entitle anyone to receive any public funds, does not create any program for the provision of any services, and does

not allow private organizations such as Planned Parenthood to do anything that the Appropriations prohibited. Section 188.205 does not affirmatively entitle Planned Parenthood or any other organization to receive any public funds, even to perform abortions necessary to save a mother's life. Section 188.205 does not even require the General Assembly to fund abortions necessary to save a mother's life. Instead, § 188.205 only restricts the use of public funds.

The Appropriations did not appropriate any funds in violation of § 188.205 as they did not expend any public funds for the purpose of performing or assisting abortions or for the purpose of encouraging or counseling women to have abortions. The Appropriations, therefore, were entirely consistent with § 188.205 and did not amend § 188.205. They did not violate Article III, § 23. See, e.g., Rolla 31 Sch. Dist., 837 S.W.2d at 4-5 (appropriation did not violate Article III, § 23 because it was consistent with previously enacted general statutes and did not directly amend any general statutes); Opponents of Prison Site, Inc. v. Carnahan, 994 S.W.2d 573, 580 (Mo. App. 1999) ("[T]he appropriation bills in question here did not violate the state constitution to the extent they reflected the General Assembly's selection of the Bonne Terre prison site in that they did not amend any substantive laws in regard thereto.").

E. The Appropriations Did Not Include Legislation of a General Character

Contrary to Planned Parenthood's contention, the Appropriations did not include legislation of a general character. Unlike legislation of a general character, the

Appropriations did not establish or alter any preexisting rights and did not proscribe any conduct.

The Appropriations appropriated funds to the Department of Health for the specified purpose of providing family planning services, pregnancy testing, and follow-up services during the State's fiscal years 2000 and 2001. The Department could have provided those services directly. Alternatively, it could enter into contracts with outside organizations to provide those services so long as those organizations complied with the conditions of the Appropriations. Although the Department could grant funds to organizations that complied with the conditions of the Appropriations, no organization had any right to receive such funds even if it complied with those conditions and wanted to provide services for the Department.

Moreover, notwithstanding Planned Parenthood's protestations, the Appropriations did not force anyone to alter their conduct against their will. The conditions of the Appropriations only applied to those parties who voluntarily chose to receive funds under those statutes. Planned Parenthood was not required to comply with the conditions of the Appropriations if it did not choose to seek funds under those statutes. The State could constitutionally require Planned Parenthood and other recipients of State family planning funds to comply with the conditions for receiving those funds. Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey, 167 F.3d 458 (8th Cir. 1999).

As discussed above, Article IV, § 23 of the Missouri Constitution allows an appropriations bill to contain restrictions on the expenditure of the appropriated funds:

"Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose." The restrictions in the Appropriations distinctly specified the purpose of the appropriations as contemplated under Article IV, § 23.

In addition, in Bayne v. Secretary of State, 392 A.2d 67, 74-75 (Md. 1978), the Court of Appeals of Maryland held that the Maryland legislature could, without running afoul of the Maryland Constitution's prohibition on including general legislation in the state's Budget Bill (i.e., an appropriation bill), include restrictions in the Budget Bill that prohibited the expenditure of appropriated funds to pay for abortions for the state's Medicaid patients unless the life or health of the mother was at risk, there was a risk of a severe birth defect, or the pregnancy resulted from rape or incest. The court ruled:

> The General Assembly's authority to reduce or strike out an item of appropriation necessarily includes the authority to condition or limit the use of money appropriated, or the use of the facility for which the money is appropriated, provided the condition or limitation is directly related to the expenditure of the sum appropriated, does not, in essence, amend either substantive legislation or administrative rules adopted pursuant to legislative mandate, and is effective only during the fiscal year for which the appropriation is made. The conditions here meet this test. These are an integral part of the appropriation, directly related to the spending of the sum appropriated. They do not constitute an amendment of substantive legislation or administrative rules adopted pursuant to a legislative

> mandate; they do not require that the program of Medical Assistance be implemented in a manner contrary to statute or regulation. And, of course, the conditions are effective only during the fiscal year for which the appropriation was provided.

Id.

The conditions in the Appropriations are analogous to the conditions in the appropriation bill in Bayne. The conditions in the Appropriations were directly related to the expenditure of the sum appropriated, did not amend or conflict with any general statute, and were effective only during a single fiscal year. Accordingly, they were not legislation of a general character and did not violate Article III, § 23. No Missouri case remotely suggests otherwise.

F. The Cases Cited by Planned Parenthood Are Inapposite

In supports of its argument, Planned Parenthood cites Hueller and Gaines. (Planned Parenthood also cites Board of Educ. of City of St. Louis v. State, 47 S.W.3d 366 (Mo. banc 2001), but that case had nothing to do with appropriations or Article III, § 23.) Neither case is apposite.

In Hueller, the plaintiff, an assistant commissioner of the permanent seat of government, sought a writ of mandamus to compel payment of his salary at the monthly rate of $150 instead of $135. At the time, Missouri statutes created and conferred certain powers on the board of the permanent seat of government. This Court construed those statutes as authorizing the board to hire assistants, such as the plaintiff, and to fix their compensation. Id., 289 S.W. at 340. In 1925, the board raised his salary from $135 to

$150 month. The General Assembly's appropriation to the board in 1925 contained language to the effect that the salary paid to any employee whose salary was not definitely fixed by statute could not exceed his salary in 1923-24. Thus, the appropriation restricted the board's implicit statutory authority to fix its employees' salaries and restricted the plaintiff's salary to $135 per month.

This Court held the salary restriction in the appropriation constituted general legislation and was invalid under the predecessor of Article III, § 23. Id. at 341. Hueller has been held to stand for the proposition that "[t]he legislature cannot fix salaries by appropriation acts but must do so by general statutes." State ex rel. Igoe v. Bradford, 611 S.W.2d 343, 350 (Mo. App. 1980). Unlike the appropriation bill in Hueller, the Appropriations did not fix or limit any salaries of public officials and did not otherwise amend any general statute.

In Gaines, this Court held that a provision in appropriations bill that attempted to limit the authority of the board of curators to reimburse African-American residents of Missouri for law school tuition in a lower amount than that provided for in a general statute was unconstitutional under the predecessor of Article III, § 23 because the appropriation attempted to amend the general statute. Id., 113 S.W.2d at 790. Unlike the appropriations bill in Gaines, the Appropriations did not amend any general statute.

G. If the Appropriations Are Unconstitutional, Then the Court Should Hold That the Appropriations Are Invalid in Their Entirety Because Severance of the Eligibility Conditions of the Appropriations from the Remainder of the Appropriations Would Contravene Legislative Intent

If Planned Parenthood is correct that the Appropriations violate Article III, § 23, then the Appropriations are invalid in their entirety and there were no valid family planning appropriations in place during the State's 2000 and 2001 fiscal years. Without valid planning appropriations, there were no family planning funds that the Director could lawfully give to Planned Parenthood. See Fort Zumwalt School Dist. v. State, 896 S.W.2d 918, 922 (Mo. banc 1995) ("Absent an appropriation by the General Assembly approved by the Governor, . . . the constitution forbids any expenditure of state revenues.").

Without explicitly saying so, Planned Parenthood apparently believes that the Court should sever over 60 lines (over ninety percent) from subsection 1 of the Appropriations and leave in place only the following part of the first sentence: "For the purpose of providing of funding family planning services, pregnancy testing and follow-up services." However, the Appropriations cannot be severed in this manner. If subsection 1 of the Appropriations violate Article III, § 23, then the Court should hold that the Appropriations are invalid in their entirety.

"The touchstone of severance analysis is legislative intent." Akin v. Director of Revenue, 934 S.W.2d 295, 300-01 (Mo. banc 1996). The Appropriations state the legislative intent:

> If any provision of subsection 1 of this section is held invalid, the provision shall be severed from subsection 1 of this section and the remainder of subsection 1 shall be enforced. If the entirety of subsection 1 of this section is held invalid, then this appropriation shall be in accordance with subsection 3 of this section; otherwise subsections 3 and 5 of this section shall have no effect.

The purpose of the Appropriations is to allow as many of the eligibility conditions in subsection 1 as possible to remain in effect and be enforced in the event that a condition for eligibility is held invalid. The General Assembly did not intend to allow for an appropriation under subsection 1 if all of the eligibility conditions are held invalid. The General Assembly's overriding goal was to ensure that abortion providers do not receive any direct or indirect economic or marketing benefit from state family planning funds. If all of the eligibility conditions are held invalid, then subsection 1 will have essentially been held invalid in its entirety.

Even when a statute has a savings clause, "if the elimination of [invalid] clauses leaves the remaining portions of the statute so that they do not express the true legislative intent but are instead in conflict with it, the statute should not be upheld." Preisler v. Calcaterra, 243 S.W.2d 62, 66 (Mo. banc 1951). Eliminating all of the eligibility conditions in subsection 1 of the Appropriations would gut the Appropriations so that they no longer express the true legislative intent.

Moreover, if the Court were to sever subsection 1 of the Appropriations as has been advocated, there would be no definition of the terms "family planning services" and

"follow-up services" as used in the first part of the first sentence of the Appropriations. Those terms, which the General Assembly purposely defined, are found in the portion of the Appropriations sought to be invalidated. This Court has previously held that a portion of a statute containing terms defined in another portion of the same statute cannot be saved where that other portion of the same statute is held invalid. Jefferson Sav. and Loan Ass'n v. Goldberg, 626 S.W.2d 640, 644 (Mo. banc 1982). Here, it cannot be presumed that the General Assembly would have enacted the first sentence of subsection 1 of the Appropriations without at the same time having enacted the remaining sentences of subsection 1, which include definitions of terms found in the first sentence.

Although subsection 2 of the Appropriations dictates that subsection 3 governs if subsection 1 is held invalid and subsection 4 dictates that subsection 5 governs if subsection 3 is held invalid, both subsections 3 and 5 contain similar eligibility restrictions as found in subsection 1. Thus, if the Court finds that subsection 1 of the Appropriations is invalid, then subsections 3 and 5 are likewise invalid under Article III, § 23 and the entire Appropriations are unconstitutional. In this case, there would not be a valid appropriation and, consequently, there would be no funds that the Director may lawfully give to Planned Parenthood. See Fort Zumwalt School Dist., 896 S.W.2d at 922 ("Absent an appropriation by the General Assembly approved by the Governor, . . . the constitution forbids any expenditure of state revenues.").

IX. The Circuit Court Correctly Considered Whether the Appropriations Violated the United States Constitution and Correctly Ruled That the Appropriations Did Not Violate the United States Constitution Because the Federal Constitutional Issue Was Before the Circuit Court and the Federal District Court's Abstention Decision Did Not Preclude the Circuit Court from Considering the Issue

Planned Parenthood challenges the Circuit's Court's ruling that the Appropriations did not violate the United States Constitution. Planned Parenthood does not challenge the merits of that ruling, but, instead, argues only that the Circuit Court should not have made this ruling because the federal district court abstained under Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941), and Planned Parenthood purportedly reserved its right under England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 419-22 (1964), to litigate its federal constitutional challenges to the Appropriations in federal court after the present case is concluded. The Circuit Court, however, properly proceeded to decide whether the Appropriations comported with the United States Constitution.

In its Second Amended Petition, the State requested a declaratory judgment that the Appropriations do not violate the United States Constitution. In the federal litigation, the State requested that the federal district court abstain under Younger v. Harris, 401 U.S. 37 (1971), which would have resulted in dismissal of Planned Parenthood's federal complaint and required Planned Parenthood to litigate its federal constitutional claims in the state litigation.

The federal district court's abstention ruling did not preclude the Circuit Court from ruling on the validity of the Appropriations under the United States Constitution. In

England itself, the United States Supreme Court explicitly recognized that "the parties cannot prevent the state court from rendering a decision on the federal question if it chooses to do so." 375 U.S. at 421.

The Circuit Court's ruling on the federal constitutional issues was appropriate because the federal district court's decision not to abstain under Younger may eventually be reversed by the federal appellate courts. If that happens, then the Circuit Court's ruling will have conclusively decided Planned Parenthood's federal constitutional claims and no further litigation will be necessary. If that does not happen, then the federal courts can decide what weight to give to the Circuit Court's ruling on the federal constitutional issues. Either way, there is no reason for this Court to vacate that ruling.

CONCLUSION

For the foregoing reasons, the Court should:

(1) reverse the Circuit Court's ruling on the Title X issue and enter judgment declaring (a) that the federal Title X program did not mandate Planned Parenthood's abortion referral, marketing, assistance, and counseling activities, and (b) that Planned Parenthood was ineligible under the Appropriations to receive state family planning funds because it directly referred patients to abortion providers, distributed marketing materials about abortion services to patients, and assisted and counseled patients to have abortions;

(2) affirm all other aspects of the Circuit Court's Judgment; and

(3) grant all other relief to which the State is entitled.

Respectfully submitted,

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I hereby certify that one copy of the foregoing brief in paper form and one copy of the foregoing brief on disk have been sent via Federal Express on December 7, 2001 to: Todd J. Jacobs, Sonnenschein, Nath & Rosenthal, 4520 Main Street, Suite 1100, Kansas City, MO 64111; Roger K. Evans, Planned Parenthood Federation of America, Inc., 810 Seventh Avenue, New York, NY 10019; Arthur A. Benson II, Jamie Kathryn Lansford, Arthur Benson & Associates, 4006 Central Avenue, Kansas City, MO 64111; and Joel E. Anderson, Assistant Attorney General, 7th Floor, Broadway Building, P.O. Box 899, Jefferson City, MO 65102.

_____

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Version #:	10
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Today's Date:	December 7, 2001

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